Supreme Court, U.S.
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No. _____

In the
Supreme Court of the United States
October Term, 1996

SECTION 28 PARTNERSHIP, LTD.,
a Florida Limited Partnership,

Petitioner,

v.

MARTIN COUNTY, FLORIDA,
a Political Subdivision of the State of Florida,

Respondent.

Petition for Writ of Certiorari to the
Fourth District Court of Appeal for the State of Florida

PETITION FOR WRIT OF CERTIORARI

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*CHARLES L. SIEMON
MARCELLA LARSEN
KATHLEEN M. MORGAN
Siemon, Larsen & Marsh
433 Plaza Real, Suite 339
Boca Raton, Florida 33432
(561) 368-3808
Attorneys for Petitioner

February, 1997

*Counsel of Record

10 pp

QUESTIONS PRESENTED FOR REVIEW

I. To maintain a ripe taking claim pursuant to the *Hamilton Bank* final decision requirement, is a property owner who seeks to develop his property in a manner not already allowed by the existing regulations nonetheless required to file an application under those existing regulations:

a) where the local government has previously been afforded the opportunity to review, and in connection with that review has rejected, two consecutive applications which sought development approval for densities proven to be the minimum economically viable use of the property;

b) where a third application on a portion of the property was submitted and approved by the local government for densities permitted by the existing regulations and where such densities were proven to be economically unviable; and

c) where the property owner subsequent to the local government's contested actions, lost control of the property in issue and was therefore unable to file any further applications on the entirety of the property.

II. Is the ripeness doctrine a substantive component of a Fifth Amendment taking analysis and is a compensable taking limited to a deprivation of one-hundred percent of all use?

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PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The decision of the Fourth District Court of Appeal for the State of Florida is reported at 676 So.2d 532 (Fla. Dist. Ct. App. 1996) and is reproduced as Appendix A. Page references are to the version in the Appendix ("App.").

BASIS FOR JURISDICTION

The decision of the Fourth District Court of Appeal for the State of Florida (the "District Court of Appeal") was entered on July 17, 1996 after Petitioner's motion for rehearing. (App. A.) The Florida Supreme Court refused discretionary jurisdiction of the District Court of Appeal's decision on November 25, 1996. (A copy of the Florida Supreme Court's order is reproduced as App. B.) Petitioner was not entitled to file a motion for rehearing of this order under Florida Rule of Appellate Procedure 9.330(d). This petition for writ of certiorari has been timely filed in accordance with Rule 13.1 of the Rules of this Court. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides in pertinent part: "[N]or shall private property be taken for public use, without just compensation."

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Title 42, United States Code, § 1983 provides in pertinent part:

> Every person who, under color of any statute ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

A. The Federal Questions at Issue in This Petition Were Timely and Properly Raised in the Proceedings Below

On July 14, 1994, after reviewing evidence presented in a two week bench trial, the trial court entered a judgment in favor of the Petitioner, Section 28 Partnership, Ltd., (the "Partnership") on its state and federal taking and substantive due process claims asserted in its first amended complaint. Petitioner's federal claims were asserted under the Fifth and Fourteenth Amendments to the Constitution of the United States and 42 U.S.C. § 1983. (The trial court's July 14, 1994, judgment is reproduced as App. C.)

Respondent, Martin County, Florida (the "County"), then filed an appeal of the trial court's ruling to the District Court of Appeal, asserting *inter alia* that the Partnership's taking claims were not ripe for judicial review under the "final decision" mandates of *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985). As a result, the federal questions at issue in this matter were first raised in the District Court of Appeal's original February 28,

1996, opinion rendered in response to the appeal filed by the County. (The District Court of Appeal's initial opinion rendered on February 28, 1996, is reproduced as App. D.)

Petitioner filed a motion for rehearing in the District Court of Appeal which was granted by the court and resulted in an amended opinion dated July 17, 1996 which is reproduced as App. A. The District Court of Appeal overruled the trial court's judgment in favor of the Partnership on the state and federal takings claim on the basis that the Partnership's claims were not ripe for judicial review. In connection with its ripeness determination, the District Court of Appeal considered the ripeness test to be a substantive component of a taking analysis:

> It is a fair summary of the law that in "takings" cases involving permit denials and other land use restrictions, the landowner must meet the difficult burden of establishing that: (1) the regulation denies substantially all economically beneficial or productive use of the land; (2) alternative uses were applied for and conclusively denied by the regulatory body; and (3) at least one meaningful application has been filed under the existing regulations.

(App. A at 9, *citing Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 136-137 (1978))(state court citations omitted). Additionally, the District Court of Appeal cited to the Supreme Court's holding in *Hamilton Bank* to support its ruling that the claims were not ripe because the County had not reached a "final, definitive position" because the Partnership "had not sought development of the property under the existing regulations." (App. A at 9.) The Petitioner seeks review of the District Court of Appeal's decision on rehearing, (App. A), and the federal issues raised therein.

B. The County Repeatedly Rejected the Partnership's Attempts To Develop its Property at Minimum Economically Viable Uses

Between 1987 and 1990, the Partnership and/or its predecessor in interest (hereinafter, collectively referred to as the "Partnership"), began assembling property for residential development in Martin County, Florida just across the Palm Beach County, Florida line. By 1990, the Partnership had assembled, through purchase or contracts for sale, a 638.5 acre parcel of land commonly referred to as "Section 28." (R.XI:131: PEx.8.) Prior to assembling the land which comprises Section 28, the Partnership carefully studied the parcel to determine whether residential development would be appropriate for parcel. This investigation included an analysis of Section 28's location, the surrounding land uses, the pattern of growth and development in the area, concurrency and availability of public services under the existing land use designations of Section 28 under the County's Comprehensive Growth Management Plan (the "Comp. Plan.") (R:XI:130, 152, 161, 322.)

The County's Comp. Plan contains a Future Land Use Map ("FLUM") with land use designations for all the property located in the County. Although the FLUM is denominated a map for "future" growth, in reality the FLUM merely reflects land uses in existence at the time the map was created. (R:XXII:1895.) Prior to assembling the land which constitutes the entirety of Section 28, the Partnership reviewed the land use designations for Section 28 contain on the FLUM in the County's Comp. Plan and found them to be an inexplicable patchwork of designations. (R:XI:139-46; PEx.9.) The County's Comp. Plan sets forth criteria for a land use designation change for an individual parcel of land as contained in the FLUM. The Partnership hired a consulting team to

analyze the land use designations for Section 28 and their analyses demonstrated that the patchwork of agricultural and large lot residential designations for Section 28 were inappropriate and were required to be changed pursuant to each of the applicable criteria in the County's Comp. Plan. (R:XI:140-44; XIV:580-87, 589-93; XV:718-19; PEx.38.)

1. The Partnership's First Application

In 1990, the Partnership retained a team of planning and development consultants and spent in excess of $300,000.00 to develop an economically feasible and environmentally sensitive plan of development for Section 28. (R.XI:166; XIV:550-52; XVII:1002.) The Partnership hired a former Assistant Martin County Attorney with extensive experience in planning and zoning matters in Martin County, (R.XIV:546), to assist in the preparation of the Partnership's application. (R.XIV:550.)

The attorney for the Partnership investigated changes in land use and land use designations of the property surrounding Section 28 since its original land use designations were assigned in 1982. (R.XIV:566.) Research revealed that significant changes had occurred in the vicinity of Section 28 since 1982. The property to the south of Section 28 had been rezoned from 1 unit per 5 acres to allow development of 3 units per 1 acre. In addition, the land immediately to the east of Section 28 had been rezoned to allow 4 to 6 units per acre. The property to the southeast had been rezoned to allow 6-8 units per acre. More importantly, water and sewer service had been extended to serve Section 28 and road capacity was available to meet County and State concurrency requirements. (R.XIV:568-70.)

The Partnership submitted to the County a "PUD Justification Statement," which demonstrated that the development proposed complied with all of the County's applicable regulations, including the criteria for an amendment

to the County's Comp. Plan. (R.XIV:572-74, 580-88; PEx.38.) The proposed development of Section 28 met all level of service requirements under local and state regulations. (R.XIV:575, 586.)

The Partnership submitted to the County a concurrent, unified application package for a site-specific amendment to the Comp. Plan to change the land use designations on Section 28 and to expand the urban service area boundaries to include Section 28 so that Section 28 could be developed on public water and sanitary sewer lines. A rezoning request was also submitted to the County which sought an approval of a Planned Unit Development ("PUD") golf course community with a density of less than one dwelling unit per acre on Section 28. (R.XI:172-74; XIV:571-72; PEx.16-17.) The densities sought by the Partnership were proven to be the minimum economically viable use of the property. (R.II:228-29, 233-35.)

The County staff required that the Partnership's plan contain a 500 foot buffer between any development and the border of the buffer zone of the state park located near border of Section 28's property line. A buffer was required despite the County's failure to cite to a planning rationale for the buffer and despite the fact that a buffer is not required under the mandates of the County's Comp. Plan. (R.XIV:587-88.) In April of 1991, the County denied the 1990 application package stating no reasons for the denial. (R.XII:193.)

2. The Partnership's Second Application

After the denial, the Partnership met with members of the County staff and a County Commissioner, who indicated that the County would be more interested in an innovative development of Section 28. The Commissioner assured the Partnership that a new application would be fairly reviewed and the County suggested that a mixed use development utilizing a neo-traditional "village center" concept was the type of

innovative development the County wanted. (R.XII:193-96.) The Partnership hired an entirely new group of consultants at an approximate cost of $350,000.00 to prepare such a plan. (R.XII:197-99; XVII:1002.)

In September, 1991, after an extensive planning process which included meetings with County staff and elected officials, the Partnership submitted another concurrent site-specific application package for Comp. Plan amendments, a PUD, and a rezoning for Section 28. (R.XII:209; PEx.27-28.) The application proposed a comprehensive development of Section 28 at a gross density of 1.07 to 1.27 dwelling units per acre with 685 dwelling units; 27 holes of golf; an optional "village center" with 125 village residential units; and provided for the funding and construction of a roadway through the property. (R.XII:319; PEX.27-28.) At the County's request, the Partnership revised the application to reduce the size of the village center from 40 to 5 acres and the overall density to 1.07 dwelling units per acre. (R.XII:217-18; PEx..33; R.XIII:319; PEX. 27-28.) The number of dwelling units requested by the Partnership was based on the minimum economically viable density for the development of the site. (R.XX:1515-16; XXI:1612.)

The County again required a buffer this time of 300 feet, but gave no planning rationale for this size buffer. Nor is any such buffer provided for or required by the County's Comp. Plan. (R.XVIII:1120-24.)

The 1991 application package complied with all the applicable County regulations, including the requirements for a site-specific amendment to the County's Comp. Plan, PUD approval and a rezoning, (R.XI:140-44; XII:214; PEx.155), and under such circumstances the County had no discretion to deny the application. (R.XIV:617-620.) Nonetheless, in May of 1992, the County denied the Partnership's application package,

again stating no reason for the denial. (R.XII:211; XVIII:1157-58, 1163-64, 1181-83.)

After the County denied the 1991 application, the Partnership filed a petition with the County requesting that the County reconsider its action because the Partnership could not build an economically viable project under current regulations. (R.XII:228-29, 233-35.) The County did not reconsider its decision and took no action in response to the petition. (R.XII:234-35; XVII:999-1000.)

Subsequent to the denial of the 1991 application, the Partnership approached the County with two additional proposals to develop portions of Section 28.[1] (R.XII:242-44.) The Partnership proposed to develop the east half of Section 28 with the contiguous 131 acres to the south in Palm Beach County. (R.XII:242-43.) In the alternative, the Partnership requested that it be permitted to develop the 222 acres it held in fee with 150 units on public water and sewer. (R.XIII:243-44.) The County refused to consider either of these proposals. (R.XIII:242-44.)

3. The Partnership's Third Application

After the County's refusal to consider the Partnership's alternate proposals, the Partnership then undertook to mitigate its damages by filing a "by-right" application seeking approval under the County's existing regulations for the 222 acre portion

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[1] Because the Partnership pursued these alternative development plans for Section 28 as part of compromise and settlement discussions, the trial court prohibited the Partnership from putting on evidence of such proposals. At trial the Partnership submitted that this evidence was to be offered only for the purpose of proving the Partnership's claims were ripe for adjudication, not to establish the County's liability. The trial court deemed the County's ripeness defense waived, (R.XIV:600-01), and allowed the Partnership to offer this evidence only through an offer of proof. (R.XII:235-42.)

of Section 28 it still controlled (the "1993 application"). (R.XVII:1002-03.) After the Partnership expended $75,000, the County approved the 1993 application and the Partnership was then permitted to develop 71 units on well and septic on the 222 acres it then owned in fee. (R.VXII:1004; PEx.36). However, the 71 units approved by the County, left the Partnership with no economically viable use of this property. (R.XII:254-55; XVII:1007-09; XX:1537-38.) After the 1993 approval, the Partnership unsuccessfully attempted to sell the property. (R.XII:256; XVII:1005.) Efforts to obtain financing on the property so the Partnership could develop Section 28 itself also failed. (R.XII:255-56; XVII:1004-05; XX:1536-37.)

The Partnership has invested $7.5 million in the development of Section 28 and the Partnership's interest in the property and the project have been destroyed as a result of the County's actions in denying the applications for development approval for Section 28. (R.XVII:1007, 1026; PEx.8, 87(a).)

C. The District Court of Appeal Found the Partnership's Takings Claims Unripe Because the Partnership Did Not Apply for Approvals for All of Section 28 Under the Existing County Regulations

As aforementioned, the Partnership offered evidence at trial that it has sought development of Section 28 for that portion of the land which it owned in fee in 1993. The Partnership submitted an application in 1993 under the existing regulations, however this project was never built because it was economically unfeasible, environmentally undesirable, unfinanciable and no other developers would consider buying this parcel, because of the perception in the marketplace regarding Martin County's policies against real estate development. (R:XII:254-56; XVII:1004-1009; XX:1536-38.)

Nonetheless, the District Court found the Partnership's takings claims unripe because the Partnership failed to submit an application under the existing regulations *for the entirety of Section 28*. (App. A at 9.) The evidence showed that at the time of trial, the Partnership had no ability to submit further applications for the entirety of Section 28 as it had lost control of portions of the parcel. (R.XVII:1026.) Even if the application had been possible, the evidence further demonstrated that these underlying uses the District Court of Appeal determined the Partnership should apply for, provided no economically viable use. (R.XXIX:2955-56; R.XII:254-56; XVII:1004-09; XX:1536-38.)

REASONS FOR GRANTING THE WRIT

If the substantive contours of the "taking issue" are the lawyers' equivalent to the physicists' quark,[2] the ripeness doctrine is the "mother" of all Stygian nightmares. Few doctrines have been so wildly misunderstood as the "ripeness doctrine," however, Petitioner respectfully submits that the District Court of Appeal's handiwork *sub judice* stands alone.[3]

Put plainly, "[r]ights, constitutional and otherwise, do not exist in a vacuum." *Carey v. Piphus*, 435 U.S. 247, 254 (1978). In the absence of efficient and effective judicial

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[2] Charles Haar, LAND USE PLANNING 766 (3d ed. 1976)(*quoted* in *Hamilton Bank*, 473 U.S. at 199 n.17).

[3] Petitioner respectfully submits that the extent of the District Court of Appeal's deviation from this Court's ripeness test exceeds even the Ninth Circuit Court of Appeal's decision in *Suitum v. Tahoe Regional Planning Agency*, 80 F.3d 359 (9th Cir. 1996), *cert. granted*, 117 S. Ct. 293 (1996). Petitioners have submitted an *amicus curiae* brief in connection with this Court's consideration of the *Suitum* case in which the adoption of a clear ripeness rule is advocated.

review of the application of land use regulations to individual parcels of land, property rights exist only at the whim of the regulator. If the ripeness doctrine can be used to shield local government planning and zoning actions from judicial review by requiring useless applications for development approval which are not economically viable or repeat applications on the hope that a less "grandiose" plan might find favor with the local authorities, then there are effectively no property "rights."

Justice Holmes long ago warned that "the natural tendency of human nature is to extend the qualification more and more until at last private property disappears." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). The ripeness rulings of the District Court of Appeal, and many federal and state courts which require multiple applications for development approval and useless and futile acts, should not be allowed to provide cover for this "natural tendency."

This case follows a long list of confusing, inconsistent and frequently draconian lower federal and state court cases which purport to apply United States Supreme Court rulings regarding the ripeness doctrine in land use cases.[4] These lower court cases have created a system of judicial review which lacks certainty and utterly fails to follow any clear rule of law, oftentimes denying property owners who are involved in legitimate and concrete disputes regarding the use of their property, the right of judicial review. The District Court of

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[4] *See generally* Berger, M., "The 'Ripeness Mess' in Federal Land Use Cases or How the United States Supreme Court Converted Federal Judges Into Fruit Peddlers," 1991 INSTITUTE ON PLANNING, ZONING AND EMINENT DOMAIN (Southwest Legal Found. 1991); Kassouni, T., "The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights," 29 Cal. W. L. Rev. 1 (1992); Overstreet, G., "The Ripeness Doctrine of the Taking Clause: A Survey of Decisions Showing Just How Far Federal Courts Will Go To Avoid Adjudicating Land Use Cases," 10 J. Land Use & Envtl. L. 91 (1994).

Appeal's decision in this case is one of the most extreme examples of the ripeness doctrine gone awry; a new rule of exhaustion -- financial, physical and otherwise -- has been created which guarantees that no property owner will obtain effective judicial review.

The District Court of Appeal below held, *as a substantive component of a Fifth Amendment taking analysis*, that the Partnership must file an application for uses permitted under the existing regulations before a ripe just compensation taking claim may be asserted. Transforming the *Hamilton Bank* final decision requirement into a process with no foreseeable termination and an exercise in futility, the District Court of Appeal determined that the Partnership, which had already submitted *three applications* to the County at a cost of over $725,000, was nonetheless required to file a fourth.

Further, in its apparent zeal to impose this novel ripeness rule, the District Court of Appeal ignored this Court's pronouncements regarding "futile," or "pointless" applications. The record before the trial court was clear: the Partnership applied to the County for permission to develop its property with the minimum economically viable densities and the underlying zoning and land use regulations did not afford any economically viable, beneficial or productive use of the property. In addition, the record before the trial court was that the Partnership had indeed filed an application under the existing regulations for the portion of the property it still owned, but that such uses permitted by the County were not viable. Finally, the Partnership was unable to file an application under the existing zoning which the District Court of Appeal deemed a prerequisite to a Fifth Amendment claim because the Partnership lost control of the property.

Petitioner respectfully submits that this Court should grant the petition to resolve the following issues and conflicts

posed by the District Court of Appeal's interpretation of the Fifth Amendment:

> (1) Does the ripeness doctrine require putative property owner plaintiffs to file multiple applications, including applications for uses which are not economically viable, uses which can not be developed, and uses for the property that the would-be plaintiff no longer controls, to create a final decision which is ripe for review?
>
> (2) Is the final decision requirement a jurisdictional "case or controversy" issue, or is it a substantive component of a Fifth Amendment taking analysis as held by the District Court of Appeal?
>
> (3) Is a compensable taking limited to a deprivation of one-hundred percent of all use?

These three issues, Petitioner respectfully submits, are in desperate need of clarification by this Court. The lack of certainty in the land use litigation arena has created an untenable situation for property owners aggrieved by local government land use regulations; property owners quite literally have no way of knowing when enough is enough and their grievances are ripe for review.

ARGUMENT

I.

THIS COURT SHOULD GRANT THE PETITION TO DECIDE WHETHER THE *HAMILTON BANK* FINAL DECISION RULE REQUIRES MULTIPLE REAPPLICATIONS AND USELESS APPLICATIONS FOR PERMITTED USES

Petitioner requests that this Court exercise its jurisdiction to decide the question of first impression whether the *Hamilton Bank* final decision rule requires multiple reapplications and, in particular, whether the rule requires property owners to apply for already permitted uses -- uses which the evidence demonstrates do not afford an economically viable use and will never be utilized by the property owner.

Belaboring under a fundamental misconception of the parameters and purpose of the ripeness doctrine elucidated in *Hamilton Bank*, the District Court of Appeal held:

> A governmental entity must arrive at a "final, definitive position," on the "nature and extent of permitted development" before a court may adjudicate the "constitutionality of the regulations that purport to limit it." ... [Because] the Partnership had not sought development of the property *under the existing regulations* ... we conclude that any "takings" claim based upon the cumulative effect of the underlying zoning regulations and comprehensive plan restrictions, as applied to Section 28, is simply not ripe for review.

(App. A at 9 *citing* this Court's decisions in *Hamilton Bank*, 473 U.S. at 191, and *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 351)(emphasis added). Compounding its error, the District Court of Appeal subsumed its new ripeness test into a remarkable re-interpretation of the Fifth Amendment taking analysis:

> It is a fair summary of the law that in "takings" cases ... the landowner must meet the difficult burden of establishing that: (1) the regulation denies substantially all economically beneficial or productive use of the land; (2) alternative uses were applied for and conclusively denied by the regulatory body; and (3) at least one meaningful application has been filed under the existing regulations.

(App. A at 9, *citing Penn Cent. Transp. Co v. City of New York*, 438 U.S. 104, 136-37 (1978) for this unusual and unprecedented "summary" of Fifth Amendment takings.)

The District Court of Appeal's reformulation of the ripeness rule is simply wrong and exalts legal fiction over the relevant facts and evidence in this matter. The essence of the District Court of Appeal's determination on ripeness was that the Petitioner allegedly had not submitted an application to develop the Section 28 property "under the existing regulations," (App. A at 9), when -- in fact -- Petitioner had *three times* submitted formal applications to the County, including its final application *under the existing regulations*.

The bottom line of the District Court of Appeal's decision is a new rule of law and interpretation of the United States Constitution that to state a taking claim, a property owner must submit not one, not two, not three, but *four* applications before it may state a taking claim; and, at least one of those applications must be for the entire property under the

existing regulations. Under this new ripeness rule, this fourth application under the existing regulations must be filed notwithstanding the lack of economic viability of such permitted uses. Suffice it to say that the law has never imposed this sort of impossible "pass gate" requirement and the District Court of Appeal's refusal to acknowledge the undisputed fact that Petitioner had lost control of Section 28 and could no longer as a practical matter submit additional applications, speaks miles of the court's misadventure.

Because the District Court of Appeal's new ripeness rule flies in the face of this Court's ripeness decisions and creates as a ripeness prerequisite to Fifth Amendment taking claims, the necessity of filing meaningless, and apparently unlimited, reapplications, the Partnership respectfully submits that this Court should accept this writ and the error be corrected.

A. Multiple Applications or Applications Under the Existing Regulations Are Not Required

At its core, the ripeness doctrine is nothing more than a modern expression of the time-honored juridical rule requiring a concrete controversy as a predicate to constitutional adjudication:

> The difference between an abstract question and a "case or controversy" is one of degree ... [t]he basic inquiry is whether the "conflicting contentions of the parties ... present a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract."

Babbitt v. United Farm Workers National Union, 442 U.S. 289, 297-298 (1979)(citations omitted). In the land use context, some lower federal courts have held, Petitioners would submit

correctly, that for a local government to assert that a claim is not ripe for review, evidence must be presented demonstrating that the government would actually approve another use which provides some value to the property owner.[5]

In the hands of other lower federal courts and many state courts, however, the ripeness doctrine has been transmogrified into a Sisyphean endurance course of multiple applications for development permission and of useless and futile acts. Consequently, the application of local government land use regulations to individual parcels of land is immunized from judicial review for all but the wealthy and very patient.

Despite the District Court of Appeal's apparent confusion, the Partnership submits that a careful reading of this Court's decisions make it clear that the ripeness doctrine is a simple standard intended to ensure a sufficiently factual setting for constitutional adjudication -- nothing more and nothing less. Multiple reapplications, applications under the existing

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[5] *Beuré-Co. v. United States*, 16 Cl. Ct. 42, 50 n.9 (1988) ("In *MacDonald*, the majority stressed that '[a] property owner is of course not required to resort to piecemeal litigation or otherwise unfair procedures in order to obtain [a] determination [of what use if any may be made of the affected property.]' To comply with this mandate, especially in situations where a takings claim is plausible, a regulatory agency that denies a development plan should specify to the extent it reasonably can based on the information before it, the aspects of the plan that are inconsistent with the regulations and the changes that would be necessary to result in the issuance of the permit, *i.e.*, specify the type of development that generally would be permitted consistent with the regulations."); *Greenbriar v. City of Alabaster*, 881 F.2d 1570, 1576 (11th Cir. 1989), *reh'g denied*, 893 F.2d 346 (11th Cir. 1989)(holding that reapplication was futile where "City never presented evidence that the property at issue could have been developed under more intensive zoning than the existing zoning"); *Herrington v. County of Sonoma*, 857 F.2d 567, 570 (9th Cir. 1988), *cert. denied*, 489 U.S. 1090 (1989)(finding claim ripe where "the County has at no time asserted that application for a variance was a viable option").

regulations and futile or pointless applications have never been required by this Court as a prerequisite to a Fifth Amendment taking claim.

In *Hamilton Bank*, the Court formally established the simple and succinct "final decision" ripeness test:

> ... a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulation has reached *a* final decision regarding the application of the regulations to the property at issue.

Hamilton Bank, 473 U.S. at 186 (emphasis added). The *Hamilton Bank* Court concluded that a "final decision," under the particular facts of the case, required both a "plan for developing [the] property" and an application for a variance. *Hamilton Bank*, 473 U.S. at 187-88.

The variance requirement in *Hamilton Bank* was based on the factual circumstances of that case wherein the regulations specifically noted that a variance was required *in addition to plat approval* to correct any deficiencies in the application. *Hamilton Bank*, 473 U.S. at 189 n.10 (quoting regulations). A variance was required because, based on the record before the Court, a variance could have resolved the minor size and configuration problems raised by the local government in denying the application. *See Hamilton Bank*, 473 U.S. at 193 (variance required to determine whether the landowner could "develop the subdivision in the manner [it] proposed"). No *per se* requirement of multiple applications or applications for every conceivable use was adopted by the *Hamilton Bank* Court.

Subsequent to its holding in *Hamilton Bank*, this Court found the just compensation taking claim in *MacDonald*, 477

U.S. 340, to be unripe. In *MacDonald*, the Court held that the County's rejection of a preliminary subdivision plan which it determined had failed to adequately deal with several infrastructure issues, was not a "meaningful application" and that the County's rejection did not constitute a "final decision." Importantly, zoning was not at issue in *MacDonald* -- only the layout of the project was subject to review. *MacDonald*, 477 U.S. at 351 and 353 n.8. Because the property owner's application, which was denominated "preliminary," was deficient in several respects, the Court determined that it was not "meaningful" and that there was no final decision as to what development would be permitted. *MacDonald* was further limited by the fact that the Court specifically determined that *there were remaining economically viable uses available to the property*. *MacDonald*, 477 U.S. at 345, 351 and 352 n.8. Because of this conclusion, and the fact that the initial application was only preliminary and inadequate in several respects, the Court determined that there had been no final decision.

MacDonald did not hold, and neither has this Court ever held, that more than one application is required before a claim is ripe for review, just that "*a* meaningful application" must be submitted before the *Hamilton Bank* test will be satisfied. Both before and after *MacDonald*, this Court has uniformly held that "meaningful" means a valid application, something more than *no effort at all to comply with local regulations.*[6]

No decision rendered by this Court has ever held, as the District Court of Appeals held, that there is a *per se*

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[6] *Cf. Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)(no application whatsoever renders claims unripe) *with Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1012 n.3 (1992)(no application required where application would be "pointless").

reapplication requirement and that application must be made under the existing regulations.[7] Indeed, such a requirement does not even serve the purpose of the ripeness doctrine to ascertain the land use regulator's "final decision." What such a draconian ripeness rule does ensure, however, is that no property owners will be able to successfully maintain Fifth Amendment taking claims, even where, as here, there have been multiple application denials and the underlying regulations do not afford any economically viable, beneficial or productive use.

B. Futile or "Pointless" Applications Are Not Required

Further, even if there were a *per se* reapplication requirement and a property owner could reasonably be required to submit four development applications seeking development approvals, this Court has plainly recognized that applications which are futile or "pointless" are not required. The District Court of Appeal's "fair summary" of the Fifth Amendment taking test and subsumed ripeness inquiry failed to adhere to this Court's decisions regarding futility and therefore this writ should be granted.

This Court has made it quite clear that *no* application will be required where such application would be futile or "pointless." *Lucas*, 505 U.S. at 1012 n.3. Or, said another way, no application is required where the regulations are clear on their face as to what development will be allowed. *Cf. MacDonald*, 477 U.S. at 352 n.7 (unfair procedures in order to obtain a final determination not required). Indeed, the Court

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[7] It is impossible to list the number of cases in conflict with the District Court of Appeal's new ripeness standard, and perhaps the clearest direction to the Court is to point to the absence of *any* case requiring four applications as a prerequisite to a ripe taking claim.

has specifically noted that the ripeness doctrine should not be used to work injustices:

> A property owner is of course not required to resort to piecemeal litigation or otherwise unfair procedures in order to obtain this determination.

MacDonald, 477 U.S. at 352 n.7.

Here it is plain that further application to the County was then, and still is, futile. The County has already had an opportunity to review, not one, *but three*, separate applications for the Section 28 property. The third application, the 1993 "by-right" application -- the Partnership's third application -- was filed under the existing regulations and was proven at trial not to afford an economically viable use. Additionally, the Partnership three more times approached the County to attempt to achieve some sort of permission to use its property, but was denied.[8] Now that the Partnership has lost its interest in the entirety of Section 28 -- through the wrongful actions of the County -- it simply is not possible for the Partnership to file the application the District Court of Appeal has said it must. This is the quintessence of futility.

Finally, several lower federal courts have recognized the intuitive principle that the ripeness doctrine should not require a property owner to apply for uses which are not economically viable, and Petitioner respectfully submits that this Court should formally do so as well. In *Beuré-Co.*, 16 Cl. Ct. 42 (1988), for example, the Court of Claims held:

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[8] These additional attempts to develop Section 28 were made in the form of two offers of settlement and compromise and one formal petition to the County Board. The trial court, in apparent recognition of the insincerity of the County's ripeness defense, deemed the defense waived and only allowed the Partnership to put on evidence relating to finality through an offer of proof. (R.XIV:600-01; R.XII:235-42.)

> The ripeness requirement should not oblige a landowner to seek a permit for a development proposal that it does not deem economically viable and, hence, does not intend to undertake.

Beuré-Co., 16 Cl. Ct. at 15 n. 10. Fundamental to this principle that a property owner should not be required to submit applications for development approvals which he does not intend to build is the also intuitive proposition that finality may be demonstrated through a lack of available viable, beneficial or productive uses.[9]

The Partnership plainly demonstrated in the trial court, and accordingly the trial court found a taking, that the County's underlying zoning and land use regulations did not afford any economically viable, beneficial or productive use. This fact in and of itself established the ripeness of the Partnership's claims. To require, as the District Court of Appeal has required, the Partnership to now "apply" for these uses which can not and will not ever be used simply makes a mockery of the judicial system and exalts form over function.

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[9] *See, e.g., Corn v. City of Lauderdale Lakes*, 816 F.2d 1514, 1516 (11th Cir. 1987)(finality is manifested by showing of no beneficial uses of property available). *Cf. First English Evan. Luth. Church v. Cty. of Los Angeles*, 482 U.S. 304, 318-19 (1987) (compensation required for even temporary takings); *Lucas*, 505 U.S. at 1012 (where all beneficial use is denied assumption that the "benefits and burdens of economic life are being adjusted is inappropriate"); *MacDonald*, 477 U.S. at 353 n. 9 (specifically finding a remaining economically viable use).

II.

THIS COURT SHOULD GRANT THE PETITION TO RESOLVE THE CONFLICT BETWEEN THIS COURT'S TAKINGS DECISIONS AND THE DISTRICT COURT OF APPEAL'S SUBSTANTIVE DEPARTURE FROM THE FEDERAL STANDARD

Petitioner respectfully submits that this Court should accept jurisdiction to correct the District Court of Appeal's substantial misstatement of the proper Fifth Amendment taking analysis. Specifically, the Court should grant the writ to clarify that the ripeness doctrine is not a substantive component of a Fifth Amendment taking and also to make it clear, once and for all, that a taking may occur under circumstances other than a deprivation of one-hundred percent of all use.

In what is perhaps the most remarkable over-simplification in the tortured history of the "taking issue," the District Court of Appeal's stated that:

> It is a fair summary of the law that in "takings" cases involving permit denials and other land use restrictions, the landowner must meet the difficult burden of establishing that: (1) the regulation denies substantially all economically beneficial or productive use of the land; (2) alternative uses were applied for and conclusively denied by the regulatory body; and (3) at least one meaningful application has been filed under the existing regulations.

(App. A at 9.) In an incredulous departure from well-established law, the District Court of Appeal "morphs" the ripeness doctrine from a prerequisite for jurisdiction into a

fixed substantive criterion for a taking; an end no less than the United States Supreme Court found nigh impossible:

> ... this Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.

Penn Central, 438 U.S. at 124. This Court will search its opinions, indeed the decisions of state and federal courts throughout the land, in vain for a decision which is consistent with the District Court of Appeal's interpretation of the ripeness doctrine as a *substantive* criterion for a taking.

Petitioner respectfully submits that the District Court of Appeal's decision is not only an *un*fair summary, but is in direct conflict with the holding of this honorable Court in numerous of its takings cases, including, *Penn Central*, 438 U.S. 104 (1978); *Agins*, 447 U.S. 255 (1980); *Nollan v. California Coastal Commission,* 483 U.S. 825 (1987); *Lucas*, 505 U.S. 1003 (1992); and *Dolan v. City of Tigard,* 512 U.S. 374 (1994).

In the United States, the concept of property exists, not as an abstraction, but as the "yield" of a tension between the individual freedom to own and use property and the inherent power of the government to regulate for the public health, safety and welfare. The constitutional framework for the tension between public and private interests in the use of private property, however, is not a simple bright line test. How far is "too far," *Penn Central*, 438 U.S. at 124, is determined by "the particular circumstances [in that] case" in what are "essentially ad hoc, factual inquiries [with] the extent to which

the regulation has interfered with distinct investment-backed expectations," *id.*, playing a role in the analysis.

It is in failing to provide an effective and efficient forum for these *ad hoc* determinations that the District Court of Appeal, many lower federal courts and many state courts' treatment of ripeness threatens the very existence of property rights. The District Court of Appeal's decision has reduced the "takings" calculus to nothing more than a search for even the slightest value, thereby condemning this Court's holding in *Penn Central* to the dust bin.

Further, as this Court has repeatedly summarized the law, the essence of the just compensation clause is to provide "justice and fairness" by ensuring "that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." *Penn Central*, 438 U.S. at 124.[10] The District Court of Appeal simply ignored the concept of "justice and fairness" and reduced this Court's holdings to a wooden analysis as to whether any shred of value remains to the property subject to the challenged regulation.

The District Court of Appeal's "fair" summary of takings jurisprudence excommunicates nearly all of the takings factors prescribed by this Court, including: diminution in value; the relationship of the regulation to the public health, safety and welfare (what this Court has described as a "substantially advances" taking); and the question of investment-backed expectations from this Court's analytical prescription which has served the Court so well since *Penn*

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[10] *See also Agins*, 447 U.S. at 260 ("The determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest.").

Central. Petitioner submits that it would be difficult for the District Court of Appeal to have more plainly departed from this Court's decision and that a conflict warranting jurisdiction is manifest.

Moreover, the evident conflict is not a matter of academic curiosity, it is a matter of overriding public interest. In 1980, the United States recognized the existence of a substantive prong of the just compensation imperative in the Fifth Amendment: "[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests." *Agins*, 447 U.S. at 261. Further, in *Nollan*, 483 U.S. 825 (1987), the Court made the point abundantly clear that the taking clause imposes a *substantive* limit which is more rigorous than the "wink of the eye" fairly debatable standard suggested by the District Court of Appeal in this matter:

> Contrary to Justice BRENNAN's claim, *post*, at 3150, our opinions do not establish that these standards are the same as applied to due process or equal protection claims. To the contrary, our formations in the takings field have generally been quite different. *We have required that the regulation "substantially advance" the "legitimate state interest" sought to be achieved, not that "the State 'could rationally have decided' that the measure adopted might achieve the State's objective."*... We view the Fifth Amendment's property clause to be more than a pleading requirement and compliance with it to be more than an exercise in cleverness and imagination.

Nollan, 483 U.S. at 835 n.3 (citations omitted)(emphasis added). This Court has repeatedly confirmed the existence of

the substantially advances takings standard on numerous occasions, as have the lower federal courts.[11]

The District Court's "fair summary" conflicts with all of these cases, most remarkably, in this case where the trial court, who heard the evidence and the witnesses and judged the credibility and weight of what he heard, found the County's failed to substantially advance a legitimate government purpose and that the imposition of the buffer condition additionally effected a taking.

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[11] For federal cases recognizing a "fails to substantially advance taking" *see Dolan*, 512 U.S. at 379 (1994)(a taking occurs where land use regulations do not "substantially advance a legitimate government purpose"); *Lucas*, 505 U.S. at 1016 ("As we have said on numerous occasions, the Fifth Amendment is violated when land-use regulation 'does not substantially advance legitimate state interests....'"); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 485, 485 (1987)("We have held that land use regulation can effect a taking if it 'does not substantially advance legitimate state interests ...'"); *A.A. Profiles, Inc. v. City of Fort Lauderdale*, 850 F.2d 1483, 1488 (11th Cir. 1988), *cert. denied*, 400 U.S. 1020 (1989)("the governmental regulation must 'substantially advance' a 'legitimate government interest'").

CONCLUSION

Petitioner, Section 28 Partnership, Ltd., respectfully requests that this Court grant the petition for writ of certiorari. The Fourth District Court of Appeal for the State of Florida has effectively eviscerated the applicability of the Fifth Amendment in the State of Florida.

Rights do not exist in a vacuum and in the absence of reasonable access to judicial enforcement of those rights, rights are smothered in the cost and delay of navigating the perilous shoals of contemporary growth management. Worse still, the application of the District Court of Appeal's holding to the facts in this case results in total destruction of the Petitioner's rights. The consequence of the County's wrongful acts in denying not one, but two, applications for development approval and six years of litigation is that the Petitioner has now lost control of the Section 28 property and has no ability to comply with the District Court of Appeal's treadmill ripeness requirements.

In sum, the exercise of this Court's jurisdiction is necessary to address a substantial injustice and a significant departure from the Fifth Amendment's proscription: "nor shall private property be taken without payment of just compensation."

Respectfully submitted,

CHARLES L. SIEMON, Counsel of Record
MARCELLA LARSEN
KATHLEEN M. MORGAN
Siemon, Larsen & Marsh
433 Plaza Real, Suite 339
Boca Raton, Florida 33432
(561) 368-3808

APPENDIX

APPENDIX A
NOT FOR PUBLICATION

FOURTH DISTRICT COURT OF APPEAL
FOR THE STATE OF FLORIDA

MARTIN COUNTY, Florida,
a Political Subdivision of the State of Florida,
Appellant/Cross-Appellee,
v.
SECTION 28 PARTNERSHIP, LTD.,
a Florida Limited Partnership,
Appellee/Cross-Appellant
No. 94-2243

July 17, 1996

ON MOTION FOR REHEARING, CLARIFICATION AND CERTIFICATION

STEVENSON, Judge.

We grant appellee's motion for rehearing and clarification of our opinion filed February 28, 1996 and substitute the following opinion in its place. We deny the motion for certification.

This is an appeal from a final order of the trial court granting injunctive relief and monetary damages for alleged violations of substantive due process and the takings clauses of both the state and federal constitutions. The trial court's order is based on Martin County's denial of a series of applications for amendments to its comprehensive growth management plan designed to accommodate a proposed Planned Unit

Development which would have increased zoning densities in a square mile of land. We reverse the final judgment.

We quash the injunctive relief ordered on the basis of Martin County's refusal to amend its comprehensive plan and future land use map and the consequent denial of the development application because the trial court failed to apply the proper "fairly debatable" standard; we quash the injunctive relief and vacate the damages awarded for violations of substantive due process for the reasons discussed herein; we reverse the damages awarded based on a "taking" because the claim was not ripe.

Appellant, Section 28 Partnership, Ltd., ("the Partnership") sought approval to develop a mixed use, golf course community in a section of land ("Section 28") located in the southern portion of Martin County. Section 28 is situated immediately east and south of Jonathan Dickinson State Park. Jonathan Dickinson is a nature preserve that is approximately 15 times the size of Section 28; it is an important environmental resource and contains a rich diversity of wildlife.

The Martin County comprehensive plan for planning and land development regulation, adopted pursuant to the 1985 Growth Management Act, Chapter 163 -- Part II, Florida Statutes, designates all properties bordering on Jonathan Dickinson State Park as either rural (one dwelling unit per two acres), agricultural (one dwelling unit per twenty acres) or agricultural ranchette (one dwelling unit per five acres). In addition, under the comprehensive plan, property is either designated "primary urban service district," "secondary urban service district," or is outside any urban service district. The urban services district designation of a property determines its

priority within the county for the provision of urban infrastructure and services. Section 28 is situated outside any urban service district and does not presently qualify for the provision of public utilities necessary for development.

The Partnership sought a change in the zoning requirements and an amendment to the comprehensive plan which would permit approval of a Planned Unit Development ("PUD") allowing up to two residential units per acre (land use designation of "Estate Residential"), a golf course, a clubhouse and a "village center" with a projected 50,000 square feet of retail and office space. Approval of the application would require an amendment to Martin County's comprehensive land use plan so that public water, sewer and other urban facilities necessary for development could be provided by adjoining Palm Beach County. To accomplish this end, the Partnership proposed that the plan be amended to provide for a new urban service category designated as "Adjacent County Urban Service Area" ("ACUSA"), wherein certain property could be developed using services from an adjacent county.

Following a series of public hearings, Martin County denied the requested amendment to the land use designations on the map of the comprehensive plan and denied the request to establish a new ACUSA urban services district. Actually, the county simply refused to engage the steps mandated by the Growth Management Act which would be necessary to amend its adopted comprehensive plan. See s 163.3184, Fla. Stat. (1993). These steps generally include the local government's submission of the proposed amendment to the Department of Community Affairs for its review to determine whether the change is consistent with the statewide growth management plan. Following receipt of a report and recommendation from the Department of Community Affairs, the local government

then decides whether it should adopt the amendment to its comprehensive plan. ss 163.3184(9)-(10) & 163.3187, Fla. Stat. (1993). Because the comprehensive plan amendments were denied, the Commission did not consider or vote on the application for PUD rezoning or for the requested rezoning to Commercial Office/Residential to accommodate the proposed village center. The approval of the PUD and its necessary rezonings would have been inconsistent with the comprehensive plan.

The trial court found that Martin County's denial of the Partnership's development request for Section 28 involved the application of adopted policy. Then, the trial court went on to find that the Martin County Board of County Commissioners' refusal to grant the applications for development approval and the continued application of the land use designations to Section 28 (agriculture, agricultural ranchette and rural) was arbitrary and capricious. The trial court enjoined Martin County from enforcing any development regulations on Section 28 more restrictive than one dwelling unit per acre and enjoined Martin County from impeding any installation of water and sewer for Section 28. The trial court directed Martin County to approve the Partnership's application as submitted "just as if the Board of County Commissioners had amended the Martin County Comprehensive Growth Management Plan to designate Section 28 in a land use classification which would permit one dwelling unit per acre and to designate Section 28 as a part of the primary urban service district." The trial court awarded the Partnership $100,000 in damages for violation of its substantive due process rights under the state and federal constitutions and $100,000 in damages for the taking of its property without just compensation.

The trial court's finding that the denial of the application for development approval involved the application of adopted policy necessarily led the court to view the county's decision as a quasi judicial action subject to review under the strict judicial scrutiny standard rather than the deferential "fairly debatable" standard applicable to legislative actions. *See Board of County Comm'rs of Brevard County v. Snyder*, 627 So.2d 469 (Fla.1993). We hold that the trial court committed reversible error because it was obliged to review Martin County's denial of the Partnership's application for an amendment to the comprehensive growth management plan and future land use map under the fairly debatable standard. *Section 28 Partnership, Ltd. v. Martin County*, 642 So.2d 609 (Fla. 4th DCA 1994), *rev. denied*, 654 So.2d 920 (Fla.1995) (hereinafter referred to as "*Section 28 Partnership I*"). Because the trial court applied the incorrect standard of review in its evaluation of Martin County's actions, we are unable to properly perform our review function of the trial court's order. Accordingly, remand is necessary so that the trial court may render a decision on the county's denial of the development application using the appropriate review standard.

In fairness to the trial court, we point out that it rendered its final judgment without the benefit of our decision in *Section 28 Partnership I*. The trial court's final order was rendered on July 1, 1994, and the decision in *Section 28 Partnership I* was issued on September 9, 1994. In *Section 28 Partnership I*, the Partnership sought certiorari review of the county's refusal to amend its comprehensive plan and approve the development application. The circuit court denied certiorari relief and the Partnership petitioned for writ of certiorari to this court. The panel denied certiorari and held that "the decision of the county, declining to amend the plan, was legislative rather than quasi-judicial, and that the trial court did not err in

concluding that certiorari was not available." 642 So.2d at 609. Because the county's actions were legislative in nature and involved matters of policy, review under the fairly debatable standard was required. *Id.* at 612. *Snyder*.

In reaching the conclusion that Martin County's refusal to grant the Partnership's application was legislative in nature, this court focused not only on the point that approval would require an amendment to the comprehensive plan, but also on the peculiar nature of the property and its surrounding areas: This land is situated at the headquarters of the Loxahatchee River, which has been designated as a National Wild and Scenic River by the National Park Service. It is also bordered on two sides, north and west, by Jonathan Dickinson State Park, a nature preserve. Although the size of this section of land (a square mile), in and of itself, does not necessarily determine whether the amendment would be legislative, this property is bordered on two sides by Jonathan Dickinson State Park and the Loxahatchee River Preserve area. Considering the pristine nature of the land in the park and around the river, the size of the park, and the use of it by the public, we conclude that the changes sought here involve matters of policy, subject to review under the fairly debatable standard ... *Section 28 Partnership I*, 642 So.2d at 610, 612. We find that the present record verifies the conclusions reached in Section 28 Partnership I pertaining to the legislative character of the county's refusal to grant the application. [FN1]

FN1. However, we hasten to echo this court's opinion in *Martin County v. Yusem*, 664 So.2d 976 (Fla.4th DCA 1995), *on rehearing*, 20 Fla. L. Weekly D2574 (Fla. 4th DCA Nov. 22, 1995), and caution that not all requests to amend comprehensive plans will necessarily be considered legislative. In *Yusem*, this court held that the landowner's request for the

county to amend the future land use map to increase the density on his 54 acre tract would have limited impact on the public and that the action taken by the county regarding the amendment would therefore be quasi- judicial. Citing to *Florida Institute of Technology v. Martin County*, 641 So.2d 898, 900 (Fla. 4th DCA 1994), *rev. denied*, 651 So.2d 1195 (Fla.1995), the court also noted that the board hearing was narrow and "essentially addressed the change in the land use designation for a particular piece of property."

With regard to the trial court's ruling that Martin County wrongfully denied the Partnership's request for rezoning in order to facilitate its proposed PUD, we note that the court in Snyder held that: [A] landowner seeking to rezone property has the burden of proving that the proposal is consistent with the comprehensive plan and complies with all procedural requirements of the zoning ordinance. At this point, the burden shifts to the government board to demonstrate that maintaining the existing zoning classification with respect to the property accomplishes a legitimate public purpose. In effect, the landowners' traditional remedies will be subsumed within this rule, and the board will now have the burden of showing that the refusal to rezone the property is not arbitrary, discriminatory, or unreasonable. If the board carries its burden, the application should be denied. 627 So.2d at 476. It was undisputed that the Partnership's proposed PUD and accompanying request for rezoning were not consistent with Martin County's comprehensive plan. Accordingly, the Partnership never met its initial burden under *Snyder* and therefore, the burden never shifted to the county to show that the refusal to rezone was not arbitrary, discriminatory or unreasonable.

Turning to the Partnership's substantive due process argument, we find that the issues concerning these claims and Martin County's refusal to amend its comprehensive plan and the consequent denial of the development application are inextricably intertwined. Indeed, after formulating the test to be applied when a landowner seeks to challenge the denial of a rezoning request, the court in *Snyder* stated that the "landowners' traditional remedies will be subsumed within this rule." 627 So.2d at 476. The term "traditional remedies" refers to the landowner's "attempt to prove that the denial of the application was arbitrary, discriminatory or unreasonable"--or put another way, the landowner's attempt to show a violation of substantive due process. *Id.*

Accordingly, it appears likely that the trial court could have applied the incorrect legal standard in ruling on the substantive due process claim as well as on the rezoning claim. Therefore, we conclude that the interests of justice would best be served if these issues were resolved at the same time and during the same proceeding to eliminate the possibility of legally inconsistent results. We vacate that part of the judgment awarding damages and injunctive relief for violation of substantive due process and remand for a new hearing. *See Passaat, Ltd. v. Bettis*, 654 So.2d 980 (Fla. 4th DCA 1995)(a party is entitled to have his case judged under a correct standard of proof). By this opinion, we do not mean to suggest or imply that the result reached by the trial court could not have been reached with application of the proper standard of proof.

We reverse the trial court's damage award of $100,000 for an unlawful "taking" predicated on the county's conditional requirement of a 300-foot environmental buffer area along the boundaries of Jonathan Dickinson State Park prior to approval of any proposed development of the property. We point out

that the requirement for a 300-foot environmental buffer (within which land uses would be restricted to "recreational preserve" or golf course use) is somewhat illusory because this proviso was nothing more than a conditional staff recommendation to the Martin County Board of County Commissioners, assuming that the PUD was approved in other respects. In any event, this issue has been rendered moot because the PUD was not approved and we have, in this opinion, reversed the trial court's ruling directing the county to approve the PUD.

Further, even if the trial court's "takings" damage award can be interpreted as applying to all of Martin County's underlying land use regulations applicable to Section 28, the award still could not be sustained. It is a fair summary of the law that in "takings" cases involving permit denials and other land use restrictions, the landowner must meet the difficult burden of establishing that: (1) the regulation denies substantially all economically beneficial or productive use of the land; (2) alternative uses were applied for and conclusively denied by the regulatory body; and (3) at least one meaningful application has been filed under the existing regulations. *See Tinnerman v. Palm Beach County*, 641 So.2d 523 (Fla. 4th DCA 1994); *City of Pompano Beach v. Yardarm Restaurant*, Inc., 641 So.2d 1377, 1384 (Fla. 4th DCA 1994), rev. denied, 651 So.2d 1197 (Fla.1995); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 136-37, 98 S.Ct. 2646, 2665-666, 57 L.Ed.2d 631 (1978). The Partnership's proof falls short as a matter of law in each category in the instant case. Evidence at trial indicated that there were reasonable economic uses available for Section 28 (including farming and large lot single family home development) and even more importantly, the Partnership had not sought development of the property under

the existing regulations so that the extent of the alleged taking, if any, could be quantified.

Therefore, we conclude that any "takings" claim based upon the cumulative effect of the underlying zoning regulations and comprehensive plan restrictions, as applied to Section 28, is simply not ripe for review. As this court stated in *Taylor v. Village of North Palm Beach*, 659 So.2d 1167, 1173 (Fla. 4th DCA 1995): A governmental entity must arrive at a "final, definitive position," *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 191, 105 S.Ct. 3108, 3119, 87 L.Ed.2d 126, 141 (1985), on the "nature and extent" of permitted development before a court may adjudicate the "constitutionality of the regulations that purport to limit it." *MacDonald, Sommer & Frates [v. Yolo County]*, 477 U.S. [340] at 351 [106 S.Ct. 2561, 2567, 91 L.Ed.2d 285 (1986)]. Florida courts have adopted the federal ripeness policy of requiring a "final determination from the government as to the permissible uses of the property." *Glisson [v. Alachua County]*, 558 So.2d [1030] at 1035-36 [Fla. 1st DCA 1990]; *Department of Envtl. Reg. v. MacKay*, 544 So.2d 1065, 1066 (Fla.1989); *City of Jacksonville v. Wynn*, 650 So.2d 182, 186-188 (Fla. 1st DCA 1995); Lee County v. Morales, 557 So.2d 652 (Fla. 2nd DCA) *review denied*, 564 So.2d 1086 (Fla.1990). A final determination requires at least one meaningful application. *Glisson*, 558 So.2d at 1035. As we recently noted, "[r]ipeness requires a firm delineation of permitted uses so that the extent of the taking can be analyzed." *Tinnerman v. Palm Beach County*, 641 So.2d 523, 526 (Fla. 4th DCA 1994).

Accordingly, the damages awarded by the trial court are reversed and the injunctive relief is quashed. We remand this cause to the trial court for further proceedings consistent with

this opinion. Additional hearings may be held and evidence taken at the discretion of the trial court. We have also examined the issues raised in the cross-appeal and find that they are without merit.

REVERSED and REMANDED.

GUNTHER, C.J., and DELL, J., concur.

APPENDIX B
NOT FOR PUBLICATION

Supreme Court of Florida

CASE NO. 88,810/November 25, 1996
District Court of Appeal,
4th District - No. 94-2243

SECTION 28 PARTNERSHIP, LTD,

Petitioner,

v.

MARTIN COUNTY, FLORIDA , etc.,

Respondent.

* *

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is so ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330 (d).

KOGAN, C.J., OVERTON, SHAW, GRIMES AND ANSTEAD, JJ., concur

s/s SID J. WHITE
Clerk Florida Supreme Court

APPENDIX C
NOT FOR PUBLICATION

IN THE CIRCUIT COURT OF THE
NINETEENTH JUDICIAL CIRCUIT
IN AND FOR MARTIN COUNTY, FLORIDA
Case No. 92-569 CA

SECTION 28 PARTNERSHIP LTD.,
a Florida limited partnership,

Plaintiff,

vs.

MARTIN COUNTY, FLORIDA

Defendant.

FINAL JUDGMENT

THIS CAUSE came before this Court on a non-jury trial upon the claims asserted in the first amended complaint filed by Plaintiff, Section 28 Partnership, Ltd. (the "Partnership") against Defendant, Martin County, Florida (the "County"). The Partnership's claims arose out of the Board of County Commissioners' denial of an application for development approval for a square mile of land in Martin County ("Section 28"). The Court heard over 13 days of testimony from more than 30 witnesses, received over 200 items of evidence and heard final argument of all counsel.

Based on the foregoing, this Court renders the following findings of fact and conclusions of law and orders the following relief:

FINDINGS OF FACT

1. Section 28 is a unique parcel of real property which borders Palm Beach County on the east and the south and Jonathan Dickinson State Park on the west and northwest. Section 28 is functionally isolated from Martin County and is connected to what Martin County refers to as the "South County Area" by a narrow isthmus in the northeast corner of the property. (See Defendant's Exhibit 7.) Section 28 is located to the east of I-95 and the Sunshine State Parkway. Section 28's location in relation to Jonathan Dickinson State Park, I-95 and the Parkway precludes any future growth directly to the west of Section 28.

2. Although Section 28 is located in the potable water service area of the Town of Jupiter and the sanitary sewer service areas of the Loxahatchee River Environmental Control District, Ch. 71- 822 (Laws of Florida), Section 28 is not included in the County's primary urban service district. Lands to the north and east of Section 28 in the South County Area of Martin County, which are south of Jonathan Dickinson State Park, are included in the primary urban service district and are served by water and sewer providers located in Palm Beach County. The primary urban service district in the South County Area ends at the northeast corner of Section 28. As a result, the County refuses to allow public sewer and water to be used to serve the development of Section 28. The evidence at trial revealed that water and sewer service is available from Palm Beach County. The evidence shows that the Partnership

had previously sought a primary urban service designation for Section 28 which was denied.

3. The Partnership brought its action against the County, after the Board's denial of the Partnership's applications for development approval of Section 28 (the "Application"). The Applications included:

a. A site specific text and map amendment to the Martin County Comprehensive Growth Management Plan to designate Section 28 as an adjacent county urban services district so that potable water and sewer service from Palm Beach County could be used to service the development of Section 28;

b. A future land use map amendment for Section 28 to change the land use designation from agriculture, agricultural ranchette and rural to estate and COR; and

c. A concurrent residential planned unit development ("PUD") at a gross density of 1.27 dwelling units per acre.

4. The PUD included a total acreage of 638.5 acres, of which approximately 86.6 acres represented wetlands, and 49 acres represented preserve area, leaving the Partnership with approximately 502.9 acres for development in the PUD.

5. Of the 502.9 acres, the County required that the Partnership create a buffer area separating Jonathan Dickinson State Park from Section 28 which would run 7,920 feet along the west and north borders of Section 28 with a width of 300 along those borders.

6. The west half section of Section 28 is designated as agricultural ranchette even though the policies of the Martin County Comprehensive Growth Management Plan provide that such development should be located primarily to the west of the Sunshine State Parkway.

7. The first amended complaint contained the following counts:

a. Count I (a) for declaratory and injunctive relief for violation of the Partnership's substantive and due process rights under Article I, sections 2 and 9 of the Constitution of the State of Florida, and under the Fifth and Fourteenth Amendments to the Constitution of the United States and 42 U.S.C. §1983;

b. Count I (b) for money damages for violation of the Partnership's substantive due process rights under Article I, sections 2 and 9 of the Constitution of the State of Florida and under the Fifth and Fourteenth Amendments to the Constitution of the United States and 42 U.S.C. §1983;

c. Count II for declaratory and injunctive relief and money damages for the denial of the Partnership's equal protection rights under Article I, section 2 of the Constitution of the State of Florida, and under the Fourteenth Amendment to the Constitution of the United States and 42 U.S.C. §1983;

d. Count III for declaratory and injunctive relief and money damages for the taking of the Partnership's property without just and full compensation under Article I, section 2 and Article X, section 6 of the Constitution of the State of Florida, and under the Fifth and Fourteenth

Amendments to the Constitution of the United States and 42 U.S.C. §1983.

CONCLUSIONS OF LAW

8. The application of the Martin County Comprehensive Growth Management Plan and the County's zoning code to Section 28, a specific parcel of privately owned property, involved the application of adopted policy to the Partnership's individual interests and basic property rights which are protected by Article I, sections 2 and 9 and Article X, section 6 of the Constitution of the State of Florida and the Fifth and Fourteenth Amendments to the Constitution of the United States. See Board of County Commissioners of Brevard County v. Snyder, 627 So. 2d 469 (Fla. 1993).

9. The Board's refusal to grant the Partnership's site specific applications for development approval, including the application for PUD approval, and the continued application of the agriculture, agricultural ranchette and rural land use designations was and is arbitrary and capricious and does not bear a substantial relationship to the public health, safety and welfare.

10. The 300 foot buffer imposed by Martin County constitutes an uncompensated taking of the Partnership's land. While the buffer may be desirable, the notion of a property owner being compelled to contribute land which is not necessary to mitigate an adverse impact or in order to create a public benefit is not an appropriate condition precedent to development approval. If the Board wishes to advance a buffer program, it may do so by using its power of eminent domain for public purposes. See Nollan v. California Coastal Commission, 483 U.S. 825 (1987); Dolan v. City of Tigard, 8

Fla. L. Weekly Fed. S 331 (U.S. Supreme Court March 23, 1994).

THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED THAT:

1. This Court finds for the Plaintiff on Count I (a) of the first amended complaint and orders that Martin County is enjoined from enforcing and all restrictions to or on Section 28 which are more restrictive than one (1) unit per acre, unless otherwise agreed to by the parties. In connection with the foregoing, Martin County is enjoined from impeding or otherwise interfering with the development of Section 28 at a density of at least one (1) dwelling unit per acres and the installation of water and sewer for Section 28. Any ordinances, resolutions or rules enacted by the Martin County Board of County Commissioners with regard tot he development of Section 28 tot he contrary are hereby rendered null and void. Martin County shall, within a reasonable time, consider and approve Plaintiff's application for planned unite development as submitted to the Board of County Commissioners on May 5, 1992 as if the Board of County Commissioners had amended the Martin County Comprehensive Growth Management Plan to designate Section 28 in a land use classification which would permit one (1) dwelling unit per acre and to designate Section 28 as a part of the primary urban district. (638 units for total section).

2. This Court finds for the Plaintiff on Count I(b) of the first amended complaint and awards money damages to the Plaintiff in the sum of $100,000 against Martin County.

3. This Court finds against the Plaintiff on Count II of the first amended complaint.

4. This Court finds for the Plaintiff on Count III of the first amended complaint and awards money damages to the Plaintiff in the sum of $100,000 against Martin County, for its unlawful taking.

5. This Court reserves jurisdiction to enforce this final judgment, to grant Plaintiff as the substantially prevailing party its attorneys' fees and costs pursuant to applicable state law and to take such other actions as this Court deems appropriate.

FOR ALL OF WHICH LET EXECUTION ISSUE.

DONE AND ORDERED in Chambers in St. Lucie West, St, Lucie County, Florida on 14 July 1994.

s/s THOMAS G. O'CONNELL
Circuit Court Judge

APPENDIX D

NOT FOR PUBLICATION

FOURTH DISTRICT COURT OF APPEAL
FOR THE STATE OF FLORIDA

MARTIN COUNTY, Florida,
a Political Subdivision of the State of Florida,
Appellant/Cross-Appellee,
v.
SECTION 28 PARTNERSHIP, LTD.,
a Florida Limited Partnership,
Appellee/Cross-Appellant
No. 94-2243

Feb. 28, 1996.

STEVENSON, Judge.

This is an appeal from a final order of the trial court granting injunctive relief and monetary damages for alleged violations of substantive due process and the takings clauses of both the state and federal constitutions. The trial court's order is based on Martin County's denial of a series of applications for amendments to its comprehensive growth management plan designed to accommodate a proposed Planned Unit Development which would have increased zoning densities in a square mile of land. We reverse the final judgment.

We quash the injunctive relief ordered on the basis of Martin County's refusal to amend its comprehensive plan and future land use map and the consequent denial of the development application because the trial court failed to apply

the proper "fairly debatable" standard; we quash the injunctive relief and reverse the damages awarded for violations of substantive due process because there was competent, substantial evidence in the record that the comprehensive plan and zoning restrictions applicable to the property were a valid and reasonable exercise of local government legislative decision-making power; we reverse the damages awarded based on a "taking" because the claim was not ripe.

Appellant, Section 28 Partnership, Ltd., ("the Partnership") sought approval to develop a mixed use, golf course community in a section of land ("Section 28") located in the southern portion of Martin County. Section 28 is situated immediately east and south of Jonathan Dickinson State Park. Jonathan Dickinson is a nature preserve that is approximately 15 times the size of Section 28, an important environmental resource and contains a rich diversity of wildlife.

The Martin County comprehensive plan for planning and land development regulation, adopted pursuant to the 1985 Growth Management Act, Chapter 163 -- Part II, Florida Statutes, designates all properties bordering on Jonathan Dickinson State Park as either rural (one dwelling unit per two acres), agricultural (one dwelling unit per twenty acres) or agricultural ranchette (one dwelling unit per five acres). In addition, under the comprehensive plan, property is either designated "primary urban service district," "secondary urban service district," or is outside any urban service district. The urban services district designation of a property determines its priority within the county for the provision of urban infrastructure and services. Section 28 is situated outside any urban service district and does not presently qualify for the provision of public utilities necessary for development.

The Partnership sought a change in the zoning requirements and an amendment to the comprehensive plan which would permit approval of a Planned Unit Development ("PUD") allowing up to two residential units per acre (land use designation of "Estate Residential"), a golf course, a clubhouse and a "village center" with a projected 50,000 square feet of retail and office space. Approval of the application would require an amendment to Martin County's comprehensive land use plan so that public water, sewer and other urban facilities necessary for development could be provided by adjoining Palm Beach County. To accomplish this end, the Partnership proposed that the plan be amended to provide for a new urban service category designated as "Adjacent County Urban Service Area" ("ACUSA"), wherein certain property could be developed using services from an adjacent county.

Following a series of public hearings, Martin County denied the requested amendment to the land use designations on the map of the comprehensive plan and denied the request to establish a new ACUSA urban services district. Actually, the county simply refused to engage the steps mandated by the Growth Management Act which would be necessary to amend its adopted comprehensive plan. See s 163.3184, Fla.Stat. (1993). These steps generally include the local government's submission of the proposed amendment to the Department of Community Affairs for its review to determine whether the change is consistent with the statewide growth management plan. Following receipt of a report and recommendation from the Department of Community Affairs, the local government then decides whether it should adopt the amendment to its comprehensive plan. ss 163.3184(9)-(10) & 163.3187, Fla.Stat. (1993). Because the comprehensive plan amendments were denied, the Commission did not consider or vote on the application for PUD rezoning or for the requested rezoning to

Commercial Office/Residential to accommodate the proposed village center. The approval of the PUD and its necessary rezonings would have been inconsistent with the comprehensive plan.

The trial court found that Martin County's denial of the Partnership's development request for Section 28 involved the application of adopted policy. Then, the trial court went on to find that the Martin County Board of County Commissioners' refusal to grant the applications for development approval and the continued application of the land use designations to Section 28 (agriculture, agricultural ranchette and rural) was arbitrary and capricious. The trial court enjoined Martin County from enforcing any development regulations on Section 28 more restrictive than one dwelling unit per acre and enjoined Martin County from impeding any installation of water and sewer for Section 28. The trial court directed Martin County to approve the Partnership's application as submitted "just as if the Board of County Commissioners had amended the Martin County Comprehensive Growth Management Plan to designate Section 28 in a land use classification which would permit one dwelling unit per acre and to designate Section 28 as a part of the primary urban service district." The trial court awarded the Partnership $100,000 in damages for violation of its substantive due process rights under the state and federal constitutions and $100,000 in damages for the taking of its property without just compensation.

The trial court's finding that the denial of the application for development approval involved the application of adopted policy necessarily led the court to view the county's decision as a quasi-judicial action subject to review under the strict judicial scrutiny standard rather than the deferential "fairly debatable" standard applicable to legislative actions.

See Board of County Comm'rs of Brevard County v. Snyder, 627 So.2d 469 (Fla.1993). We hold that the trial court committed reversible error because it was obliged to review Martin County's denial of the Partnership's application for an amendment to the comprehensive growth management plan and future land use map under the fairly debatable standard. *Section 28 Partnership, Ltd. v. Martin County*, 642 So.2d 609 (Fla. 4th DCA 1994), *rev. denied*, 654 So.2d 920 (Fla.1995) (hereinafter referred to as "Section 28 Partnership I"). Because the trial court applied the incorrect standard of review in its evaluation of Martin County's actions, we are unable to properly perform our review function of the trial court's order. Accordingly, remand is necessary so that the trial court may render a decision on the county's denial of the development application using the appropriate review standard.

In fairness to the trial court, we point out that it rendered its final judgment without the benefit of our decision in Section 28 Partnership I. The trial court's final order was rendered on July 1, 1994, and the decision in Section 28 Partnership I was issued on September 9, 1994. In Section 28 Partnership I, the Partnership sought certiorari review of the county's refusal to amend its comprehensive plan and approve the development application. The circuit court denied certiorari relief and the Partnership petitioned for writ of certiorari to this court. The panel denied certiorari and held that "the decision of the county, declining to amend the plan, was legislative rather than quasi-judicial, and that the trial court did not err in concluding that certiorari was not available." 642 So.2d at 609. Because the county's actions were legislative in nature and involved matters of policy, review under the fairly debatable standard was required. *Id.* at 612. *Snyder*.

In reaching the conclusion that Martin County's refusal to grant the Partnership's application was legislative in nature, this court focused not only on the point that approval would require an amendment to the comprehensive plan, but also on the peculiar nature of the property and its surrounding areas: This land is situated at the headquarters of the Loxahatchee River, which has been designated as a National Wild and Scenic River by the National Park Service. It is also bordered on two sides, north and west, by Jonathan Dickinson State Park, a nature preserve. Although the size of this section of land (a square mile), in and of itself does not necessarily determine whether the amendment would be legislative, this property is bordered on two sides by Jonathan Dickinson State Park and the Loxahatchee River Preserve area. Considering the pristine nature of the land in the park and around the river, the size of the park, and the use of it by the public, we conclude that the changes sought here involve matters of policy, subject to review under the fairly debatable standard ... *Section 28 Partnership I*, 642 So.2d at 612. We find that the present record verifies the conclusions reached in *Section 28 Partnership I* pertaining to the legislative character of the county's refusal to grant the application. [FN1]

FN1. However, we hasten to echo this court's opinion in *Martin County v. Yusem*, 664 So.2d 976 (Fla. 4th DCA 1995), *on rehearing*, 20 Fla.L.Weekly D2574 (Fla. 4th DCA November 22, 1995), and caution that not all requests to amend comprehensive plans will necessarily be considered legislative. In *Yusem*, this court held that the landowner's request for the county to amend the future land use map to increase the density on his 54 acre tract would have limited impact on the public and that the action taken by the county regarding the amendment would therefore be quasi- judicial. Citing to *Florida Institute of Technology v. Martin County*, 641 So.2d

898, 900 (Fla. 4th DCA 1994), *rev. denied*, 651 So.2d 1195 (Fla.1995), the court also noted that the board hearing was narrow and "essentially addressed the change in the land use designation for a particular piece of property."

With regard to the trial court's ruling that Martin County wrongfully denied the Partnership's request for rezoning in order to facilitate its proposed PUD, we note that the court in *Snyder* held that: [A] landowner seeking to rezone property has the burden of proving that the proposal is consistent with the comprehensive plan and complies with all procedural requirements of the zoning ordinance. At this point, the burden shifts to the government board to demonstrate that maintaining the existing zoning classification with respect to the property accomplishes a legitimate public purpose. In effect, the landowners' traditional remedies will be subsumed within this rule, and the board will now have the burden of showing that the refusal to rezone the property is not arbitrary, discriminatory, or unreasonable. If the board carries its burden, the application should be denied. 627 So.2d at 476. It was undisputed that the Partnership's proposed PUD and accompanying request for rezoning were not consistent with Martin County's comprehensive plan. Accordingly, the Partnership never met its initial burden under Snyder and therefore, the burden never shifted to the county to show that the refusal to rezone was not arbitrary, discriminatory or unreasonable.

Turning to the Partnership's substantive due process claims (to the extent that these "traditional remedies" have not been "subsumed" within the rule enunciated in *Snyder*), we find that the trial court's order is in error because the record contains competent, substantial evidence to support a conclusion that the land use and urban service designations as well as the

accompanying zoning regulations for the Section 28 property are a reasonable means for Martin County to accomplish the legitimate growth management goals set out in its comprehensive plan. *See generally Tampa-Hillsborough County Expressway Auth. v. A.G.W.S. Corp.*, 640 So.2d 54 (Fla.1994); *see also Agins v. City of Tiburon*, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980) (low density zoning is a reasonable means to a legitimate goal of discouraging premature and unnecessary conversion of open space to urban uses). There was considerable evidence in the record that the comprehensive plan policies at issue are designed to, and do, preserve agricultural lands, protect wetlands and environmental resources, assure the efficient use of public resources and discourage urban sprawl.

Accordingly, it cannot be said that the enactment of the comprehensive land use plan as well as the accompanying zoning restrictions do not constitute valid governmental regulations on the use of property in pursuit of legitimate police power objectives. Where there is competent, substantial evidence in the record to support the governmental body's decision in regard to a matter within the scope of its police powers, the trial court must uphold that decision and may not pick and choose among any remaining alternatives. We therefore reverse the award of damages based on a violation of substantive due process and quash the injunction prohibiting the county from applying its zoning regulations and comprehensive plan to the subject property. Of course, even if land use regulations are validly enacted and meet legitimate governmental objectives, if the restrictions on the land owners use of the property go too far, they may be considered a "taking," a subject which we now consider.

We reverse the trial court's damage award of $100,000 for an unlawful "taking" predicated on the county's conditional requirement of a 300 foot environmental buffer area along the boundaries of Jonathan Dickinson State Park prior to approval of any proposed development of the property. We point out that the requirement for a 300 foot environmental buffer (within which land uses would be restricted to "recreational preserve" or golf course use) is somewhat illusory because this proviso was nothing more than a conditional staff recommendation to the Martin County Board of County Commissioners, assuming that the PUD was approved in other respects. In any event, this issue has been rendered moot because the PUD was not approved and we have, in this opinion, reversed the trial court's ruling directing the county to approve the PUD.

Further, even if the trial court's "takings" damage award can be interpreted as applying to all of Martin County's underlying land use regulations applicable to Section 28, the award still could not be sustained. It is a fair summary of the law that in "takings" cases involving permit denials and other land use restrictions, the landowner must meet the difficult burden of establishing that: (1) the regulation denies substantially all economically beneficial or productive use of the land; (2) alternative uses were applied for and conclusively denied by the regulatory body; and (3) at least one meaningful application has been filed under the existing regulations. *See Tinnerman v. Palm Beach County*, 641 So.2d 523 (Fla. 4th DCA 1994); *City of Pompano Beach v. Yardarm Restaurant, Inc.*, 641 So.2d 1377, 1384 (Fla. 4th DCA 1994), *rev. denied*, 651 So.2d 1197 (Fla.1995); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 136-137, 98 S.Ct. 2646, 2665-2666, 57 L.Ed.2d 631 (1978). The Partnership's proof falls short as a matter of law in each category in the instant case. Evidence

at trial indicated that there were reasonable economic uses available for Section 28 (including farming and large lot single family home development) and even more importantly, the Partnership had not sought development of the property under the existing regulations so that the extent of the alleged taking, if any, could be quantified.

Therefore, we conclude that any "takings" claim based upon the cumulative effect of the underlying zoning regulations and comprehensive plan restrictions, as applied to Section 28, is simply not ripe for review. As this court stated in *Taylor v. Village of North Palm Beach*, 659 So.2d 1167, 1173 (Fla. 4th DCA 1995): A governmental entity must arrive at a "final, definitive position," *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 191, 105 S.Ct. 3108, 3119, 87 L.Ed.2d 126, 141 (1985), on the "nature and extent of permitted development" before a court may adjudicate the "constitutionality of the regulations that purport to limit it." *MacDonald, Sommer & Frates [v. Yolo County]*, 477 U.S. [340] at 351 [106 S.Ct. 2561, 2567, 91 L.Ed.2d 285], Florida courts have adopted the federal ripeness policy of requiring a "final determination from the government as to the permissible uses of the property." *Glisson [v. Alachua County]*, 558 So.2d [1030] at 1035- 36; *Department of Envtl. Reg. v. MacKay*, 544 So.2d 1065, 1066 (Fla. 3rd DCA 1989); *City of Jacksonville v. Wynn*, 650 So.2d 182, 186-188 (Fla. 1st DCA 1995); *Lee County v. Morales*, 557 So.2d 652 (Fla. 2nd DCA) *review denied*, 564 So.2d 1086 (Fla.1990). A final determination requires at least one meaningful application. *Glisson*, 558 So.2d at 1035. As we recently noted, "[r]ipeness requires a firm delineation of permitted uses so that the extent of the taking can be analyzed." *Tinnerman v. Palm Beach County*, 641 So.2d 523, 526 (Fla. 4th DCA 1994).

Accordingly, the damages awarded by the trial court are reversed and the injunctive relief is quashed. We remand this cause to the trial court for further proceedings consistent with this opinion. Additional hearings may be held and evidence taken at the discretion of the trial court. We have also examined the issues raised in the cross-appeal and find that they are without merit.

REVERSED and REMANDED.

GUNTHER, C.J., and DELL, J., concur.

Supreme Court, U.S.
FILED
MAR 26 1997
CLERK

(2)

No. 96-1343

In the
Supreme Court of the United States
October Term, 1996

SECTION 28 PARTNERSHIP, LTD.,
a Florida Limited Partnership,

Petitioner,

v.

MARTIN COUNTY, FLORIDA,

a Political Subdivision of the State of Florida,

Respondent,

On Petition for Writ of Certiorari to the
Fourth District Court of Appeal for the State of Florida

BRIEF IN OPPOSITION

*NANCY E. STROUD
EDWARD F. RYAN
SUSAN L. TREVARTHEN
Burke, Weaver & Prell
1900 Glades Road, Suite 350
Boca Raton, FL 33431
(561) 391-0400
Counsel for Respondent

March, 1997

*Counsel of Record

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BRIEF IN OPPOSITION

JURISDICTION

This court has no jurisdiction over the Petition for Certiorari because: (a) the matter is moot because the trial court reversed its finding of a taking on the merits on October 25, 1996;
(b) the trial court's 1996 decision on the taking lacks finality, because a motion for rehearing on the petitioner's motion to amend the remedy is pending, and because it is unclear whether an appeal will be filed to the Florida Fourth District Court of Appeal by the petitioner; and (c) the petition exclusively addresses a supplemental holding from the Florida Fourth District Court of Appeal's decision. In support of these points, Respondent presents the Court with the following brief.

STATEMENT OF THE CASE

This case arose out of a legislative decision by Martin County not to amend its comprehensive plan guiding development in the County, as the petitioner had requested in order to allow it to seek rezonings and a planned unit development approval for approximately one square mile of land in the County. (A-3, petition) The petitioner sought to develop the land with over four times the amount of development permitted under the County's comprehensive growth management plan. See Section 28 Partnership, Ltd. v. Martin County, 642 So. 2d 609, 612 (Fla. 4th DCA 1994), rev. den., 654 So. 2d 920 (Fla. 1995).

The trial court determined that the County's actions violated the petitioner's substantive due process rights, and awarded $100,000 in damages. (C-5 and C-6, petition) It also

initially determined that a conditional staff recommendation, for a buffer area to be required if the planned unit development approval were considered and approved by the County Commission, constituted a taking of the land suggested for buffer uses, and awarded another $100,000 in damages. (C-5 and C-7) The trial court specifically stated that the only taking it found was in the buffer requirement. (An excerpt of the hearing on final judgment, dated July 14, 1994, is reproduced as App. A.)

The Fourth District Court of Appeal reversed the taking decision on its merits because it was based on a conditional staff recommendation, and thus "somewhat illusory". (A-8 and A-9) It also stated that it considered the same buffer issue moot because the comprehensive plan amendments were never enacted, because the County Commission never addressed the rezoning approvals involving the recommendation for a buffer, and because it was reversing the trial court's order approving the planned unit development. (A-8 and A-9) The Fourth District specifically stated that there were "unreasonable economic uses " available for Section 28. (A-9)

In a supplemental holding, the Fourth District also referred to the petitioner's claim in that appeal that the trial court's fining of a taking went beyond the buffer. By not finding in favor of the petitioner on this claim and by limiting the taking to the buffer in the text of the 1994 final judgment (petition, Appendix C), the trial court rejected this claim. The Fourth District assumed for the sake of argument that such an additional taking claim was before it, and discussed its view of the ripeness of the assumed claim. (A-9 and A-10) The Supreme Court of Florida denied review of the Fourth District's decision. (B-1, petition)

REASONS FOR DENYING THE WRIT

The petitioner's Questions Present for Review are entirely directed towards the supplemental holding concerning ripeness. However, regardless of this supplemental holding, the Fourth District held that the taking issue was moot and illusory, having never been addressed by the County Commission. The petitioner thus improperly invites this Court to issue a speculative and advisory opinion on ripeness issues in the absence of an actual "controversy essential to the decision of the particular case before it". United States v. Alaska S.S. Co., 253 U.S. 113, 116 (1920) (finding mootness).

Ripeness in the sense of the petitioner's Questions Presented for Review is a substantive requirement applicable to taking claims, and the courts will not find there has been any concrete injury in its absence. See, e.g., Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 193 (1985). However, even if this substantive ripeness issue were properly before this Court, the petition is procedurally premature in another sense.

The trial court considered the remand of this case and reversed the earlier decision that there was a taking, regardless of whether the taking claim was ripe. A written order on remand was entered on October 25, 1996. (The Order is reproduced as App. B) The trial court denied the petitioner's motion to modify the remedy orally on January 31, 1997, and issued its order on March 3, 1997. The petitioner has just filed a motion for rehearing on the motion to modify the remedy. All counsel have duty to bring such circumstances outside the trial record to the attention of this Court through all phases of review. Board of License Commissioners of the Town of

Tiverton v. Pastore, 469 U.S. 239, 240 (1985); Fusari v. Steinberg, 419 U.S. 379, 390-91 (1975) (Burger, J. concurring); and Alaska, 253 U.S. at 116.

ARGUMENT

The primary function of this Court has never been error correction. Rather, this Court's function is to develop the law in appropriate cases. There is no appellate or certiorari jurisdiction under 28 U.S.C. § 1257 where there is no final judgment in the state court. San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621, 630 and n.10 (1981). As Justice Rehnquist recognized in his concurring opinion, id. at 633-36, regardless of whether there is disagreement regarding the issues remaining for remand under the flexible approach of Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975), it is prudent for the Court to refrain from exercising discretionary jurisdiction to develop the law when the nature of the judgment below is unclear.

Finality serves several important ends. It avoids piecemeal federal review of state court decisions; avoids the giving of advisory opinions in the absence of an Article III case or controversy; and limits federal review of state court determinations in order to minimize federal intrusion into state affairs. See North Dakota Pharmacy Board v. Snyder's Stores, 414 U.S. 156, 159 (1973).

In a civil case, speculative contingencies which might conceivably affect the substantial rights of interested parties, but are not real and immediate, are simply not enough to establish jurisdiction. Tiverton, 469 U.S. at 242; and DeFunis

v. Odegaard, 416 U.S. 312, 320, n.5 (1974). The trial court on remand in the instant case revisited the substantive taking questions *sua sponte* and reached a different result, regardless of substantive ripeness. The petitioner's motion for rehearing on its motion to modify the remedy is pending. Thus, there is no finality as to ripeness, liability or damages on the taking claim. Exercising certiorari over this case is thus beyond the Court's jurisdiction under § 1257, and will result in an advisory opinion.

Moreover, the "capable of repetition yet evading review" exception to the application of mootness does not apply. See DeFunis, 416 U.S. at 318-19. The petitioner admits in the Questions Presented for Review that it no longer has control over any of the properties affected by the County's decision. Thus, the taking claim is not capable of repetition, because the petitioner no longer has any standing to raise additional taking challenges premised on these properties. Compare id. and Valley Forge College v. Americans United, 454 U.S. 464, 474-75 (1982).

Furthermore, the ripeness issue is also procedurally premature for yet another reason: the petitioner has the opportunity to file an appeal from the trial court's taking decision on remand. In order to grant certiorari, this Court would have to pile assumption upon speculation to find that: (a) an appeal will be filed from the remand; (b) the appeal will address the taking issue; (c) the Florida Fourth District Court of Appeal will issue a decision that reasserts its language concerning ripeness from the first appeal as the basis of its decision; and (d) the Florida Supreme Court will again deny discretionary review, or decide the case in a manner that permits these ripeness issues to return to this Court. Identifying these cumulative assumptions demonstrates that

this petition does not present justiciable issues. See Valley Forge, 454, U.S. at 472; and Stern et al, Supreme Court Practice, p. 707ff (7th Ed. 1993). Denial of certiorari is therefore appropriate. Velsicol Chemical Corp. v. U.S., 435 U.S. 942 (1978).

The petitioner will not be substantially prejudiced by the denial of certiorari, because this Court retains jurisdiction to review the 1996 Fourth District decision in any future attempt by the petitioner to seek Supreme Court review, after the conclusion of the proceedings on remand and any state appellate review of those proceedings. Hughes Tool Co. v. Trans World Airlines, 409 U.S. 363, 365 n.1 (1973); and Barclay v. Florida, 463 U.S. 939 (1983) (even where the state court treats the earlier holding as the law of the case, the earlier holding remains susceptible to Supreme Court review).

Finally, if it should appear to this Court that the petition is justiciable despite the above issues, the County would be glad to provide a complete brief in opposition for the Court's consideration. The County strongly believes that the Fourth District's decision is correct on all legal and factual points, and disagrees with the petitioner's presentation of the case to this Court. In particular, the County disagrees with the petitioner's suggestion that the Suitum case, currently under consideration in this Court, is factually or legally similar to the instant case.

CONCLUSION

Therefore, it appears that the petitioner's application for a writ of certiorari is not justiciable and should be denied.

Respectfully submitted,

Nancy E. Stroud
Florida Bar No. 278564
Edward F. Ryan
Florida Bar No. 438855
Susan L. Trevarthen
Florida Bar No. 906281
Burke, Weaver & Prell
1900 Glades Road, #350
Boca Raton, FL 33431
(561) 391-0400
(561) 392-9228 (facsimile)
Counsel for Respondent

Gary K. Oldehoff
Martin County Attorney's Office
Acting County Attorney
Florida Bar No. 449679
2401 S.E. Monterey Road
Stuart, FL 34996
(561) 288-5441
(561) 288-5439 (facsimile)

APPENDIX

APPENDIX A
NOT FOR PUBLICATION

IN THE CIRCUIT COURT OF THE
NINETEENTH JUDICIAL CIRCUIT IN AND FOR
MARTIN COUNTY, FLORIDA

CASE NO. 92-569 CA

SECTION 28 PARTNERSHIP, LTD.,
a Florida limited partnership,

Plaintiff,

vs.

MARTIN COUNTY, FLORIDA,

Defendant.

TRANSCRIPT OF PROCEEDINGS

This cause came on for hearing before the Honorable Thomas O'Connell, Judge of the Circuit Court, at the St. Lucie County Courthouse Annex, Port St. Lucie, Florida, beginning on the 14th day of July, 1994, at 9:45 a.m.

The appearances at said time and place were as follows:

For the Plaintiff: SIEMON, LARSEN & MARSH
BY: CHARLES SIEMON, ESQ.
433 Plaza Real, Suite 339
Boca Raton, FL 33432

For the Defendant: BURKE, WEAVER & PRELL
BY: NANCY ELLEN STROUD, ESQ.
1900 Glades Road, Suite 350
Boca Raton, FL 33432

COUNTY ATTORNEY'S OFFICE
NOREEN DREYER, COUNTY ATTY.
BY: NOREEN DREYER, ESQ.
and GARY OLDEHOFF, ESQ.
2401 S.E. Monterey Road
Stuart, FL 34996

[from page 30 of transcript]

...

opposed to this more general conclusion of law which we don't believe is based on the evidence.

MR. SIEMON: Your Honor, I would submit that it's based on the evidence. And, Your Honor, while the Court called out particular attention to the agricultural ranchette language, there are three classifications which are currently applied to the property. This Court has indicated that its intent is that there be a density of not less than 638 units. And I believe it's appropriate to identify each of the classifications which the Court is overruling.

So I don't believe that there's been any liberty taken in responding to this Court's announced order, and I would encourage the Court to enter the language as it appears in Paragraph 9.

THE COURT: Well, I'm going to leave Paragraph 9 as it is, in tact (sic). Which takes us to Number 10. 300-foot buffer.

MS. STROUD: The 300-foot buffer. Your Honor, the paragraph here we believe is objectionable in that it references the buffer not necessary to mitigate an adverse impact and not an appropriate condition precedent to development approval. Again, we believe that goes beyond the evidence. The plaintiff's only expert said that the buffer might be a good idea. It was a matter of whether the County should pay it. And bringing in this idea of not necessary to mitigate an adverse impact or not appropriate condition precedent to a development approval raises a question of whether any buffer would be permitted and whether it was

at all necessary. His own expert, Mr. Irwin (sic), said that a buffer is good. He supported a buffer and designed a buffer.

THE COURT: There's no doubt. I'm not in disagreement with a buffer. I'm in disagreement as to who should pay for it.

MS. STROUD: And Your Honor's original pronouncement said that clearly. This goes beyond that. So we would suggest in the fourth line striking "which is not necessary to mitigate an adverse impact", and then striking the remainder of the sentence.

THE COURT: Well, I don't believe it's necessary to mitigate an adverse impact. Because this is — the property directly to the west of this area is really not part of Jonathan Dickinson State Park, it's part of the river corridor or area which has been utilized by the park. And it was donated by McArthur if my memory — The land was donated and now the County wants to take more and create a berm is what they wanted to do.

MS. STROUD: Well, the PUD as proposed, Your Honor, would create a berm. If the PUD is supposed to be approved by normal rules and regulations of the County. And to assume that the County is somehow going to act in bad faith is unfair. We certainly are aware of the Court's decision and would indeed have more incentive to act in good faith.

THE COURT: All right. I'm going to leave — the only change is the one that I've made with the 638 units for the total section, as to 1. And that will be it.

Number 2. That's $100,000 against Martin County. I feel that was almost nominal damages under the circumstances.

MS. STROUD: We --

MR. SIEMON: Excuse me, Your Honor, I was --

THE COURT: Okay.

MR. SIEMON: I did not mean --

THE COURT: I'm not going to increase it.

MS. STROUD: Your Honor, I believe we've already talked about the federal claims and that's an issue I had on this sentence, that it should be limited to state claims and not embellished or added on to in terms of federal claims. The same in Paragraph 4, Your Honor.

THE COURT: I'm going to leave 2 and 4 as they are.

MS. STROUD: Your Honor, in 4 the taking is a bit unclear to us and we wonder based on your earlier judgment whether this is for the uncompensated taking of the 300-foot buffer? Is it limited to that? That's what we understand the taking --

THE COURT: It's for the taking --

MS. STROUD: Of the 300-foot --

THE COURT: — is what it's for. Buffer.

MS. STROUD: Of the 300-foot buffer? If Your

Honor would make that clear by adding after Martin County "for it's (sic) uncompensated taking" of the 300-foot buffer.

THE COURT: I'm going to cross out the word "and" at the end and insert "for its unlawful taking."

MS. STROUD: Of the buffer, Your Honor?

THE COURT: Unlawful taking. That will spell it out.

MS. STROUD: Okay. Is that, Your Honor, because the conclusion is already earlier referencing the buffer?

THE COURT: Yes, it does.

MS. STROUD: And in Paragraph 5, Your Honor, the words that are a problem here are the "substantially prevailing party" words. That is something Your Honor can decide in an attorney's fee hearing. It's not necessary.

THE COURT: The most recent suggestion by the Supreme Court is to send it back to the trial judge to determine who is the prevailing party. Now, that's the latest expression of the Supreme Court as far as prevailing is concerned. I have been in this bind many times, and I'll have to make that decision. I would say at this point that the ...

CERTIFICATE

STATE OF FLORIDA)
) : SS
COUNTY OF MARTIN)

I, LAURA E. MELTON, Registered Professional Reporter and Notary Public of the State of Florida at Large, do hereby certify that in the matter of SECTION 28 PARTNERSHIP, LTD. vs. MARTIN COUNTY, FLORIDA, Case No. 92-569 CA, a hearing was held before the Honorable Thomas O'Connell, beginning at the hour of 9:45, on the 14th day of July, 1994; that I was authorized to and did report in shorthand the proceedings in that hearing, and that the foregoing pages numbered 2 through 41 comprise a true and correct transcript of those proceedings.

IN WITNESS HEREOF I have hereunto affixed my hand this 29th day of July, 1994.

/s/ Laura E. Melton

APPENDIX B
NOT FOR PUBLICATION

IN THE CIRCUIT COURT OF
THE NINETEENTH JUDICIAL CIRCUIT
IN AND FOR MARTIN COUNTY
CASE NO. 92-569-CA

SECTION 28 PARTNERSHIP, LTD.,
a Florida limited partnership,

Plaintiff,

vs.

MARTIN COUNTY, FLORIDA

Defendant.

FINAL JUDGMENT ON REMAND

THIS CAUSE is again before the Court, this time on remand from the Fourth District Court of Appeal by virtue of the Opinion of the Court of Appeal dated July 17, 1996 and the Mandate issued by the Court of Appeal on August 2, 1996. This Court has jurisdiction and does hereby enter the following final judgment on remand which is intended to affirm and clarify the Court's initial July 14, 1994 final judgment:

This case involves Martin County, Florida's (the "County's") repeated refusal to allow a property owner, Section 28 Partnership, Ltd., (the "Partnership"), to develop a parcel of land known as "Section 28" with any reasonable, economically viable use. Over a course of approximately 13 days, this Court considered the testimony of more than 30 witnesses and received

over 200 exhibits into evidence. Counsel for both parties was permitted to make extensive legal argument which included the appropriate standard of review and application of that standard to the evidence.

In connection with the Court's consideration of the testimony and documentary evidence over a period of 13 days, the Court had occasion to, and did, weigh and judge the competency and credibility of the witnesses and other evidence presented. In so doing, this Court specifically concluded that the County's refusal to allow the Partnership to develop Section 28 at an economically viable density and the County's continued application of irrational land use designations on this Section 28 was not "fairly debatable," and was, in fact, arbitrary and capricious and effected a taking without payment of compensation. As was the case in Rural New Town, Inc. v. Palm Beach County, 315 So. 2d 478 (Fla. 4th DCA 1975):

> the quality and character of the evidence presented by [the Partnership] was of such magnitude as to remove the continued applicability of the existing zoning classification from the "fairly debatable" category.

Rural New Town, 315 So. 2d at 479.

Thus, this Court affirms its July 14, 1994, final judgment and incorporates the findings of fact and conclusions of law and relief ordered therein. Additionally, in order that the basis for the Court's judgment be absolutely clear for the purposes of an additional appeals, the Court makes the following supplemental findings of fact and conclusions of law and orders granting relief to the Partnership:

SUPPLEMENTAL FINDINGS OF FACT

1. The Partnership, or its predecessors in interest, applied to the County three separate times in an attempt to develop Section 28. The first application was in 1990 and was denied. The second application was in 1991 and was denied. The only competent and credible evidence at trial was that the 1990 and 1991 applications sought the minimum economically viable density for the development of Section 28 and were both denied even though both applications complied with all of the applicable County regulations and posed no health, safety or welfare concerns.

2. The County advanced some testimony that Section 28 could somehow be reasonably be used for farming and large lot single-family home development, however such evidence was incompetent and not credible and was otherwise contradicted by economic analysis which demonstrated that such uses were not economically viable on Section 28.

3. After the Partnership's two 1990 and 1991 applications were denied, the Partnership lost control of the entirety of Section 28 due to the County's wrongful actions. However, in an effort to mitigate its damages, the Partnership received approval on a third application, a so-called "by-right" application, which sought to develop a portion of Section 28 which the Partnership still owned under the existing land use designations. The only competent and credible evidence at trial was that the development approved by the County on this portion of Section 28 was not economically viable and that Section 28 has not been developed, and is not developable, pursuant to this "approval".

4. The Partnership's 1991 PUD application requested a

range of densities from 1.07 to 1.27 units to the acre. At the request of the county, the Partnership dropped the density to the lower range of only 1.07 units to the acre.

5. The character of the neighborhood in which Section 28 is located is suburban and urban residential and non-residential in nature.

6. Section 28 is adjacent to the Jonathan Dickenson State Park ("JDSP") only along the northern border of the west half section of the property. In fact, the Partnership's predecessor in interest donated 900 acres to the Save Our Rivers Program which was considered an adequate buffer for the entire length of the western side of Section 28 and the nearby Loxahatchee River.

7. Numerous competent and credible expert witnesses testified that the Partnership's requested development was consistent with the County's comprehensive plan. In fact, the density proposed by the Partnership adjacent to JDSP was one unit to every two acres, completely consistent with the existing land use designation under the County's comprehensive plan.

8. Indeed, the only competent and credible testimony at trial was that the existing land use designations on Section 28 are wholly irrational and are inconsistent themselves with the County's comprehensive plan which requires those designations to be changed. The County's own professional staff admitted that the land use designations on Section 28 were inappropriate and should have been changed. Finally, the County's own Growth Management Director testified that the land use designations on Section 28 were an "anomaly" and "totally irrational."

9. The only competent and credible testimony at trial was that there is no correlation between high density development and any negative impact on JDSP. The County's own expert witness testified that the area of greatest bio-diversity in JDSP was immediately adjacent to residential development with a density 20 times that proposed by the Partnership.

10. The County employs an "urban services boundary" as a growth control tool, yet the County's own professional staff admitted at trial that the boundary is not based on any planning rationale. The only competent and credible evidence at trial was that the County's urban services boundary is irrational and actually contributes to, rather than prevents, urban sprawl.

11. Public water and sewer are available to Section 28 within 1/4 of a mile and a matter of physical fact, but the County prohibits the use of water and sewer on Section 28. The County prohibits such logical extension of utilities because Section 28 is not included within the urban services boundary; however, the County's comprehensive plan and state law require hook-up where services are available within 1/4 of a mile. The County's own professional staff and Growth Management Director admitted that the development of Section 28 with well and septic would be environmentally undesirable and the other competent and credible testimony at trial was that the prohibition of public utilities on Section 28 is wholly irrational and contrary to sound planning.

12. The Partnership had a clear entitlement to the approval of its 1990 and 1991 applications and the change of the land use designations on Section 28 pursuant to the County's comprehensive plan and all other applicable regulations.

13. Finally, the overwhelming evidence at trial was that the County will continue to interfere with, and most likely prevent, the Partnership from achieving any economic return on Section 28 without Court intervention. The uncontradicted and only competent and credible testimony at trial was that the Partnership had lost $7 million in its attempts to develop Section 28 due to the County's wrongful interference with those efforts.

SUPPLEMENTAL CONCLUSIONS OF LAW

14. The Partnership's constitutional claims are ripe for review. The Partnership has submitted three formal applications to the County, including the last application which was pursuant to the existing regulations which themselves do not provide for any economically viable use to be made of Section 28. In any case, further applications to the County would have been entirely futile.

a. The land use designations on Section 28 deny the Partnership of all economically beneficial or productive use of its land;

b. The Partnership applied for alternative uses of Section 28 through its 1990 and 1991 applications and in a third application sought development approval under the existing regulations. The 1990 and 1991 applications were denied and the third application, though approved, does not provide the Partnership with any economically viable use; and

c. The Partnership's 1990 and 1991 applications were "meaningful" applications as was the third application submitted pursuant to the existing regulations.

15. Reasonable minds could not differ, nor is it fairly

debatable, that the existing land use designations on Section 28 are inconsistent with the County's comprehensive plan, are irrational, arbitrary and capricious and do not bear some substantial relationship to the public health, safety and welfare.

16. Reasonable minds could not differ, not is it fairly debatable, that the Partnership's 1990 and 1991 applications seeking development approval of Section 28 were completely consistent with the County's comprehensive plan and all other applicable regulations and that there was no public, health, safety or welfare rationale for the County's denial of those applications.

17. Reasonable minds could not differ, nor is it fairly debatable, that the County's actions is maintaining the existing land use designations on Section 28 and denying its two applications do not substantially advance a legitimate government purpose.

18. State law requires that land use designations be consistent with a duly enacted comprehensive plan and the land use designations on Section 28 are inconsistent with the County's comprehensive plan and are required to be changed.

19. State law requires that Section 28 be hooked up to public water and sewer because it is within 1/4 of a mile from an available line. Thus, the County's comprehensive plan which situates Section 28 outside of the urban service district is in conflict with state law.

20. The County's continued application of its existing comprehensive plan and land development regulations to Section 28 fails to substantially advance a legitimate government purpose.

21. The County's denial of the Partnership's 1990 and 1991 applications for development approval was arbitrary and capricious and failed to substantially advance a legitimate governmental purpose.

22. The Partnership has a property interest in the approval of its 1990 and 1991 applications and the change of the land use designations on Section 28.

23. The County's denial of the Partnership's 1990 and 1991 applications deprives the Partnership of all economically viable use without payment of compensation as those applications sought minimum economically viable density for Section 28.

24. The County's continued application of the land use designations on Section 28 deprives the Partnership of an economically viable use without payment of compensation.

25. The Partnership is a substantially prevailing party in this action.

THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED THAT:

1. The Court finds in favor of the Partnership on Count I of the First Amended Complaint;

a. The County's denial of the Partnership's 1990 and 1991 applications and continued application of the land use designations on Section 28 violates the Partnership's rights to substantive due process pursuant to the Constitution of the State of Florida, the Constitution of the United States and is a constitutional

tort pursuant to 42 U.S.C. § 1983;

b. The County's denial of the Partnership's 1990 and 1991 applications and continued application of the land use designations on Section 28 is irrational, arbitrary and capricious and does not bear some substantial relationship to the public health, safety and welfare; and

c. The Partnership is entitled to injunctive relief and money damages for the County's unconstitutional actions.

2. The Court finds in favor of the Partnership on Count III of the First Amended Complaint:

a. The County's denial of the Partnership's 1990 and 1991 applications and continued application of the land use designations on Section 28 does not substantially advance a legitimate government purpose;

b. The Partnership is entitled to injunctive relief.

3. The Court finds against the Partnership on Count II of the First Amended Complaint.

4. Money damages in the amount of $100,000 are awarded to the Partnership for the County's violation of the Partnership's due process rights. The Court reserves jurisdiction to alter the monetary awards should the injunctive relief awarded herein be determined to be inadequate.

5. The County is enjoined from enforcing any and all restrictions to or on Section 28 which are more restrictive than

one (1) unit per acre, unless otherwise agreed to by the parties. In connection with the foregoing, Martin County is enjoined from impeding or otherwise interfering with the development of Section 28 at a density of at least one (1) dwelling unit per acre and the installation of water and sewer for Section 28. Any ordinances, regulations or rules enacted by the County with regard to the development of Section 28 to the contrary are hereby rendered null and void. The County shall, within a reasonable time, consider and approve Plaintiff's application for planned unit development as submitted to the Board of County Commissioners on May 5, 1992 as if the Board of County Commissioners had amended the Martin County Comprehensive Plan to designate Section 28 in a land use classification which would permit one (1) dwelling unit per acre (for a total of 638 units on Section 28) and to designate Section 28 as a part of the primary urban service district.

6. This Court reserves jurisdiction to enforce this final judgment, to grant the Partnership as the substantially prevailing party its attorney's fees and costs pursuant to applicable law and to take such other actions as this Court deems appropriate.

FOR ALL OF WHICH LET EXECUTION ISSUE.

DONE AND ORDERED in Chambers in St. Lucie West, St. Lucie County, Florida on 25 October 1996.

/s/ Thomas G. O'Connell
Circuit Court Judge

cc: Charles L. Siemon, Esq., Siemon, Larsen & Marsh, 433 Plaza Real, Suite 339, Boca Raton, FL 33432.

Edward F. Ryan, Esq., Burke, Weaver & Prell, 1900 Glades Road, Suite 350, Boca Raton, FL 33431

Gary Oldehoff, Esq., Assistant County Attorney, 2401 S.E. Monterey Road, Stuart, FL 34996